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Addressing Judicial Activism in the Indian Supreme Court: Towards an Evolved Debate

By MADHAV KHOSLA*

I. Introduction

In recent years, the Indian Supreme Court has invited significant attention for the important position it has come to occupy within the nation's politics.¹ Commentary on the working of the Court has been varied, with some scholars voicing strong opposition to the judiciary's rise,² while others highlighting its role in the achievement of social

*Research Assistant, Commission on Centre-State Relations, Government of India. All views expressed are my own. I wish to thank the Hon. Justice H.S. Bedi (Supreme Court of India), Paul Craig (University of Oxford), Madhava Menon (Commission on Centre-State Relations, Government of India), Sudhir Krishnaswamy (National Law School of India University) and Ananth Padmanabhan (Advocate, High Court of Judicature at Madras) for their useful comments and suggestions. I am particularly grateful to Arun Kumar Thiruvengadam (National University of Singapore) for his comprehensive review of an earlier draft.

1. See, e.g., Pratap Bhanu Mehta, *The Rise of Judicial Sovereignty*, 18 J. DEMOCRACY 70, 72, 79 (2007) (“[T]he Court has helped itself to so much power . . . without explaining from whence its own authority is supposed to come . . . [i]n decision after decision, be it the authority to review constitutional amendments or the mode of appointing judges, the Supreme Court has created its own powers.”) (hereinafter, METHA, *The Rise of Judicial Sovereignty*); Pratap Bhanu Mehta, *With Due Respect, Lordships*, INDIAN EXPRESS, Mar. 12, 2007, available at <http://www.indian-express.com/story/25375.html> (“[T]he evidence of judicial overreach is now too overwhelming to be ignored. Courts are doing things because they can, not because they are right, legal or just.”); Pratap Bhanu Mehta, *India's Judiciary: The Promise of Uncertainty*, in PUBLIC INSTITUTIONS IN INDIA: PERFORMANCE AND DESIGN 158, 159 (Pratap Bhanu Mehta & Devesh Kapur eds., 2005) (referring to the Indian judiciary as an “institution of governance”).

2. See, e.g., Raju Ramachandran, *The Supreme Court and the Basic Structure Doctrine*, in SUPREME BUT NOT INFALLIBLE 107, 108 (B.N. Kirpal et al. eds., 2000) (observing that the basic structure doctrine has meant that “unelected judges have assumed vast political power not given to them by the Constitution”) (hereinafter, Ramachandran, *Basic Structure Doctrine*).

justice.³ The Court's experiment with public interest litigation in particular has fascinated many, both in India and around the world.⁴ Similarly, contemporary debates on the justiciability of socio-economic rights seem incomplete without reference to Court's experience in the adjudication of these rights.⁵ The usage of term "judicial activism" has become commonplace in evaluations of the Court's functioning, and the Court has acquired the reputation of being "one of the world's most powerful judicial bodies" whose judges "play an unprecedented governing role."⁶ The discourse on India's "inventive and activist"⁷ judiciary has evolved considerably

3. See, e.g., Vijayashri Sripati, *Human Rights in India – Fifty Years after Independence*, 26 DENV. J. INT'L L. & POL'Y 93, 136 (1997) ("The Indian Constitution explicitly lacks much of what is identified with modern Indian Constitutionalism; it is the Supreme Court's contribution that has established the impressive array of Fundamental Rights as we know them today. I can, therefore, think of no good reason why the Supreme Court should forsake its activism and revert to a restrained and passive role in the future."); see also Jeremy Cooper, *Poverty and Constitutional Justice: The Indian Experience*, 44 MERCER L. REV. 611, 616-34 (1993) (discussing strategies the Court has adopted to achieve social justice).

4. See, e.g., P. P. Craig & S. L. Deshpande, *Rights, Autonomy and Process: Public Interest Litigation in India*, 9 OXFORD J. LEGAL STUD. 356 (1989) (examining how public interest litigation has led to a relationship between Parts III and IV of the Indian Constitution); Jamie Cassels, *Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?*, 37 AM. J. COMP. L. 495 (1989) (discussing the limitations of public interest litigation as an instrument for social transformation); G. L. Peiris, *Public Interest Litigation in the Indian Subcontinent: Current Dimensions*, 40 INT'L & COMP. L.Q. 66 (1991); Susan D. Susman, *Distant Voices in the Courts of India: Transformation of Standing in Public Interest Litigation*, 13 WIS. INT'L L.J. 57 (1994); Parmanand Singh, *Protection of Human Rights through Public Interest Litigation in India*, 42 J. INDIAN L. INST. 263 (2000) (surveying the role of public interest litigation in protecting human rights); Ashok H. Desai & S. Muralidhar, *Public Interest Litigation: Potential and Problems*, in SUPREME BUT NOT INFALLIBLE 159 (B.N. Kirpal et al. eds., 2000); P.P. Rao, *Public Interest Litigations: Practice, Procedure and Precautions – Some Perceptions*, 31 INDIAN BAR REV. 25 (2004); see generally Christine M. Forster & Vedna Jivan, *Public Interest Litigation and Human Rights Implementation: The Indian and Australian Experience*, 3 ASIAN J. COMP. L. 1 (2008), available at <http://www.bepress.com/asjcl/vol3/iss1/art6>.

5. See, e.g., CECILE FABRE, *SOCIAL RIGHTS UNDER THE CONSTITUTION: GOVERNMENT AND THE DECENT LIFE* 180-81 (2000); Navish Jheelan, *The Enforceability of Socio-Economic Rights*, 12 EUR. HUM. RTS. L. REV. 146 (2007); Jayna Kothari, *Social Rights Litigation in India: Developments of the Last Decade*, in EXPLORING SOCIAL RIGHTS 171 (Daphne Barak-Erez & Aeyal Gross eds., 2007); SANDRA FREDMAN, *HUMAN RIGHTS TRANSFORMED: POSITIVE RIGHTS AND POSITIVE DUTIES* 124-49 (2008) (examining the Indian experience with socio-economic rights adjudication and analyzing the phenomenon of public interest litigation) (hereinafter, FREDMAN, *Human Rights Transformed*).

6. METHA, *The Rise of Judicial Sovereignty*, *supra* note 1, at 70, 79.

7. Marc Galanter & Jayanth K. Krishnan, *"Bread for the Poor": Access to*

over the past decade. Recent writings have begun to question the impact of judicial activism, and whether courts can really bring about social transformation.⁸ Scholars have inquired into the reasons for the judiciary's rise in India, and there has been a growing emphasis on the contributing influence of the failure of India's representative institutions.⁹

Yet, despite the wide-ranging body of literature examining the phenomenon of judicial activism in the Indian Supreme Court,¹⁰ the discourse in this area has, for the most part, not effectively engaged

Justice and the Rights of the Needy in India, 55 HASTINGS L.J. 789, 789 (2004).

8. See, e.g., Armin Rosencranz & Michael Jackson, *The Delhi Pollution Case: The Supreme Court of India and the Limits of Judicial Power*, 28 COLUM. J. ENVTL. L. 223 (2003) (analyzing how the Delhi Pollution Case has not resulted in providing long-term environmental protection); Lavanya Rajamani, *Public Interest Environmental Litigation in India: Exploring Issues of Access, Participation, Equity, Effectiveness and Sustainability*, 19 J. ENVTL. L. 293 (2007) (examining the limitations that arise and concerns that emerge by studying two major public interest environmental cases of the Indian Supreme Court); see generally GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2nd ed. 2008) (discussing limitations of judicial power in general).

9. See, e.g., ARUN SHOURIE, *COURTS AND THEIR JUDGMENTS* 13 (2001) ("As other institutions have neglected their duties, courts have had to step in."); see also generally ARUN SHOURIE, *THE PARLIAMENTARY SYSTEM* (2007) (suggesting the creation of a strong President and a weak Parliament); Nick Robinson, *Expanding Judiciaries: India and the Rise of the Good Governance Court*, WASH. U. GLOBAL STUD. L. REV. (2008) (forthcoming); Devesh Kapur & Pratap Bhanu Mehta, *The Indian Parliament as an Institution of Accountability*, United Nations Research Institute for Social Development: Democracy, Governance and Human Rights Programme Paper - No. 23 (Jan. 2006), available at <http://casi.ssc.upenn.edu/about/Indian%20Parliament%20&%20Accountability.pdf> (discussing the institutional decline of the Indian Parliament). For an excellent recent analysis of the problems with parliamentary debates in India (though specifically in the context of reservations), see RAJEEV DHAVAN, *RESERVED: HOW PARLIAMENT DEBATED RESERVATIONS - 1995 TO 2007* 25 (2008) ("[T]here is a lot missing in the parliamentary debates and only shows up Parliament's lack of rigour [*sic*] in respect of its primary task of making laws.").

10. See, e.g., Justice V.R. Krishna Iyer, *Judicial Activism - A Democratic Demand*, 31 INDIAN BAR REV. 1 (2004) (arguing that the Indian judiciary has a crucial role to play in safeguarding fundamental rights and furthering social justice); Justice M.N. Rao, *Judicial Activism*, SUP. CT. CASES J. 1 (1997); S.P. Sathe, *Judicial Activism: The Indian Experience*, 6 WASH. U. J.L. & POL'Y 29 (2001) (hereinafter SATHE, *Judicial Activism*); S.P. SATHE, *JUDICIAL ACTIVISM IN INDIA: TRANSGRESSING BORDERS AND ENFORCING LIMITS* (2d ed. 2003) (hereinafter, SATHE, *Transgressing Borders*); Shubhankar Dam, *Lawmaking Beyond Lawmakers: Understanding the Little Right And The Great Wrong (Analyzing the Legitimacy of the Nature of Judicial Lawmaking in India's Constitutional Dynamic)*, 13 TUL. J. INT'L & COMP. L. 109 (2005) (examining the nature of judicial decision-making in India and the legitimacy concerns that arise).

with the meaning of the term “judicial activism.” At first blush, this question appears to be an extremely fundamental one. While commentators (on the Indian Supreme Court) often ask whether or not a decision is activist, they almost never inquire into what makes a decision activist, or whether decisions ought to be considered activist in certain specific ways. Discussions on the activist nature of a decision usually begin, and end, with whether the decision appears to transcend judicial boundaries and enter the space of the executive or legislature. However, judicial activism is unfortunately not such a simple phenomenon. Its multifaceted nature suggests that a range of factors ought to be considered before a decision is branded as an instance of activism. Consequently, decisions may well be activist by some parameters but restrained by others. We can only arrive at such a sophisticated understanding of decisions if we can somehow “measure” judicial activism.

The “measuring” of judicial activism may not be a feature ordinarily associated with the study of how courts function, and the usage of the term may to some seem surprising, or even misleading. However, a recent model proposed by Cohn and Kremnitzer suggests a methodology by which such measuring may be made possible.¹¹ Cohn and Kremnitzer posit three functions of a judiciary: the traditional function of dispute resolution, the function to participate in the public sphere, and the duty to uphold certain core values. Building on previous models of activism, Cohn and Kremnitzer develop a category of parameters with respect to the performance of each function. Developing a comprehensive model with seventeen parameters, Cohn and Kremnitzer provide us with the tools using which we may attempt to “measure” judicial activism.

This paper examines how the Cohn-Kremnitzer model can be utilized in evolving the current discourse on judicial activism in the Indian Supreme Court. The Cohn-Kremnitzer model can contribute significantly to enhancing the narrative on the working of the Indian Supreme Court. Orienting the discussion on judicial activism through an application of the Cohn-Kremnitzer model will allow us to make a far greater sense of judicial decisions of India’s Supreme Court. It will also, as Cohn and Kremnitzer recognize, enable us to witness how decisions may exhibit activism by some standards and restraint by

11. Margit Cohn & Mordechai Kremnitzer, *Judicial Activism: A Multidimensional Model*, 18 CAN. J.L. & JURIS. 333, 336 (2005) (hereinafter, Cohn & Kremnitzer, *Judicial Activism*).

others.

This article proceeds in the following manner: Part II analyzes the judicial activism discourse in the Indian Supreme Court by examining the contributions of Upendra Baxi. It uses Professor Baxi as the focal point of the narrative on judicial activism in India for a range of reasons, but primarily because he can be credited with the most detailed engagement with the meaning and purpose of judicial activism put forth by an Indian scholar. Part III illustrates the manner in which the Cohn-Kremnitzer model can be applied to decisions of the Indian Supreme Court. It begins by studying the Cohn-Kremnitzer model, its virtues and its shortcomings. It proceeds to analyze three decisions of the Indian Supreme Court, two of which have been regarded as instances of activism, and the third as an instance of restraint. It attempts to illustrate how evaluating decisions through the Cohn-Kremnitzer model reveals that their activist quotient is different to what mainstream commentary on the decisions suggests.

As Cohn and Kremnitzer themselves acknowledge, their model is far from perfect.¹² It gives rise to a range of methodological concerns, most obviously the question as to the relative weight of each parameter. Further, suggesting that the judiciary has a participatory role in society may be controversial, and thus the second category of the model may require modification, and perhaps even elimination. Concerns similarly arise with respect to the third function, which stipulates that the judiciary has a duty to preserve certain constitutional goals. This paper does not attempt to provide a rigorous critique of the Cohn-Kremnitzer model and outline a framework for its modification. It also does not posit that the Cohn-Kremnitzer model can respond to all the issues that are currently being debated within the judicial activism controversy in India. However, it does argue that understanding judicial decisions as Cohn and Kremnitzer suggest can prove very useful for the present narrative in India, and could be an important step towards a refined debate in this area. The Cohn-Kremnitzer model does not hold the promise of being able to provide all the right answers; it should, however, enable us to begin asking the right questions.

12. *Id.* at 355.

II. Judicial Activism in the Indian Supreme Court: The Discourse

In the United States, the term “judicial activism” holds an important place within legal scholarship.¹³ The term was often used during the *Lochner*¹⁴ era to describe the Court’s approach towards substantive due process.¹⁵ The term was, and continues to be, routinely employed in discussions on the Warren Court which is regarded as “a fair shorthand for the peak period of extensive liberal activism that broadened, extended, and nationalized civil liberties and civil rights in America in midcentury.”¹⁶ Recently, the term “judicial activism” has acquired significance as commentators and scholars debate the legacy of the Rehnquist Court, particularly with respect to its decisions on federalism.¹⁷ Although perhaps not directly engaging with the term “judicial activist”, extensive academic commentary has recently debated issues relating to judicial supremacy and judicial review.¹⁸ Despite the fact that scholars have discussed the issue of

13. For an outstanding analysis of the history, usage, and understanding of the term “judicial activism” in the United States, see generally Keenan D. Kmiec, *The Origin and Current Meanings of “Judicial Activism,”* 92 CAL. L. REV. 1441 (2004) (hereinafter, Kmiec, *Judicial Activism*).

14. *Lochner v. New York*, 198 U.S. 45 (1905).

15. See Cass R. Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873, 874 (1987) (noting the general impression that the decision in *Lochner* was wrong because it was judicial activism and an illegitimate exercise of power by courts).

16. FREDERICK P. LEWIS, *THE CONTEXT OF JUDICIAL ACTIVISM: THE ENDURANCE OF THE WARREN COURT LEGACY IN A CONSERVATIVE AGE* 2 (1999); see also Rebecca E. Zietlow, *The Judicial Restraint of the Warren Court (and Why it Matters)*, 69 OHIO ST. L.J. 255, 257 (2008) (noting that “in academia and in politics, the Warren Court is still synonymous with judicial activism”). Zietlow discusses, in contrast with the Warren Court’s activist rulings on individual rights, its restraint towards congressional power.

17. See generally JOHN T. NOONAN, JR., *NARROWING THE NATION’S POWER: THE SUPREME COURT SIDES WITH THE STATES* (2002) (discussing how the Court’s federalism jurisprudence has lead to an expansion to judicial review and deviated from several constitutional principles); E. Thomas Sullivan, *Judicial Sovereignty: The Legacy of the Rehnquist Court*, 20 CONST. COMMENT. 171 (2003); Peter J. Smith, *Federalism, Instrumentalism, and the Legacy of the Rehnquist Court*, 74 GEO. WASH. L. REV. 906, 954 (2006) (“[T]he actual pattern of decisions suggests that the Court has not yet succeeded in divorcing questions of federalism from questions of underlying policy”); see also Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75 (2001); Calvin Massey, *Federalism and the Rehnquist Court*, 53 HASTINGS L.J. 431 (2002). For a study of the differences in judicial activism between the Warren Court and the Rehnquist Court, see generally Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045 (2001).

18. See, e.g., MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE*

judicial activism¹⁹ and recognized the importance of defining the term accurately,²⁰ the fact remains that “as the term has become more commonplace, its meaning has become increasingly unclear.”²¹

This truth applies equally, if not with greater force, to the Indian experience with the term “judicial activism.” Although scholars have used this term extensively and unhesitatingly to describe decisions of the Indian Supreme Court, there is little clarity on what the term means. This paper examines the judicial activism discourse in the Indian Supreme Court by concentrating on Upendra Baxi’s treatment of this subject. To provide a brief introduction to readers unfamiliar with Indian law, Upendra Baxi is amongst the most distinguished Indian legal scholars to date and is acknowledged as “the leading commentator on the modern Indian Constitution.”²² Currently at the University of Warwick, Baxi has held several key posts within Indian academia, including Vice-Chancellor of the University of Delhi, and Honorary Director (Research) of the Indian Law Institute.²³ Over the past two decades, Baxi has provided a keen insight into the working of the Indian Supreme Court, and has played an important part in ensuring that Indian legal academia engages with the law in an

COURTS (1999); LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006); KEITH WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY* (2007); Jamal Greene, *Giving the Constitution to the Courts*, 117 YALE L.J. 886 (2008); Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693 (2008).

19. See, e.g., Alpheus Thomas Mason, *Judicial Activism: Old and New*, 55 VA. L. REV. 385, 389 (1969) (“Judicial activism can be and indeed has been negative, defeating the governing process, as well as positive and creative.”); Greg Jones, *Proper Judicial Activism*, 14 REGENT U. L. REV. 141 (2001-2002); see generally Steven G. Calabresi, *The Congressional Roots of Judicial Activism*, 20 J.L. & POL. 577 (2004) (arguing that rather than judicial activism being counter-majoritarian, Congress allows courts to indulge in judicial activism so that it can make policies which it either supports or is unwilling to stop) (hereinafter, Calabresi, *Judicial Activism*).

20. See, e.g., Arthur D. Hellman, *Judicial Activism: The Good, the Bad, and the Ugly*, 21 MISS. C. L. REV. 253, 264 (2002) (“[I]f we’re going to have useful discussions of judicial activism, we should define the phenomenon objectively.”).

21. Kmiec, *Judicial Activism*, *supra* note 13, at 1443 (noting “[t]his is so because ‘judicial activism’ is defined in a number of disparate, even contradictory, ways; scholars and judges recognize this problem, and yet persist in speaking about the concept without defining it. Thus, the problem continues unabated: people talk past one another, using the same language to convey very different concepts.”).

22. Burt Neuborne, *Constitutional Court Profile: The Supreme Court of India*, 1 INT’L J. CONST. L. 476, 477 n.2 (2003).

23. The University of Warwick’s Law, Social Justice and Global Development Electronic Law Journal Website, Professor Upendra Baxi: Bio-Data, http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2007_1/baxi_biodata (last visited Nov. 11, 2008).

interdisciplinary fashion. Baxi has made valuable contributions in public law and socio-legal studies, and much of his recent work has focused on the nature and future of human rights.²⁴ Baxi has also played a key role as a social activist and a legal reformer in India,²⁵ and is particularly renowned for his work in support of the victims of the Bhopal gas tragedy.²⁶ In a recent article dealing with comparative constitutionalism, Ronald Dworkin noted:

I very much admire Upendra Baxi's erudition – his learning ranges from the intricacies of Lockean scholarship to the subtleties of contemporary and post-modern literary theory – but even more the skill with which he integrates this learning with a deep knowledge of the constitutional traditions of so many countries including his own He makes it plain how much an American constitutional scholar may learn from the history of Indian constitutional jurisprudence and development, in particular. His own work shows not only how careful and detailed a useful comparative constitutional jurisprudence must be, but also how profitable it can be.²⁷

In addition to fact that Baxi's works have played a pivotal role in shaping our understanding of the Indian Supreme Court, a major reason why this paper has opted to focus on his contributions is because he is one of the very few Indian constitutional scholars, in fact perhaps the only one, who can be credited with undertaking a rigorous engagement with the term "judicial activism." Although, as we shall see, his discourse on judicial activism is beset with certain imperfections, his extensive writings on the subject serve as an excellent point of reference.

24. See generally UPENDRA BAXI, *THE FUTURE OF HUMAN RIGHTS* (2nd ed. 2006); UPENDRA BAXI, *HUMAN RIGHTS IN A POSTHUMAN WORLD: CRITICAL ESSAYS* (2007).

25. See William Twining, *Human Rights: Southern Voices* Francis Deng, Abdullahi An-Na'im, Yash Ghai and Upendra Baxi, *LAW, SOCIAL JUSTICE AND GLOBAL DEVELOPMENT* ELECTRONIC LAW JOURNAL, Dec. 6, 2007, http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2007_1/twining/#a5 (last visited Nov. 11, 2008) (describing Baxi as "a pioneer in the development of social action litigation").

26. See generally UPENDRA BAXI, *MASS TORTS, MULTINATIONAL ENTERPRISE LIABILITY AND PRIVATE INTERNATIONAL LAW* (2000).

27. Ronald Dworkin, *Response to Overseas Commentators*, 1 INT'L J. CONST. L. 651, 655 (2003). Dworkin's article was a response to Baxi's criticism that Dworkin's theories do not sufficiently consider the postcolonial constitutional experience of several nations including India. See generally Upendra Baxi, "A Known But an Indifference Judge": *Situating Ronald Dworkin in Contemporary Indian Jurisprudence*, 1 INT'L J. CONST. 557 (2003).

Baxi's detailed treatment of judicial activism begins in the early 1980s, in two books that provided incisive critiques on judicial behavior in the Indian Supreme Court.²⁸ Baxi, even as early as 1980, does not concentrate on traditional debates concerned with judicial activism. He acknowledges that "the debate on judicial activism has centered on the issue whether judges do or do not make 'law' or ought or ought not to make law." However, he dismisses this question, almost suggesting its irrelevance, and quickly concludes that "the plain fact is that appellate judges make law, and not merely interpret it."²⁹ Baxi's concern seems slightly different at this stage. Rather than devoting himself to the descriptive and prescriptive questions of whether judges do and should make law, Baxi already had his answer on these issues. He was more interested in "what *kind* of law, how *much* of it, in what *manner*, within which self-imposed *limits* and to what *willed results* and with what tolerable accumulation of unintended results, may judges make law?"³⁰ Despite believing that this is the question that the judicial activism discourse should focus on, Baxi himself does not provide any framework through which the question ought to be answered. He shifts his concern instead to another important issue: What does activism mean? This question, it must be noted, is similar to the question that was put forth at the beginning of this article (*i.e.* what is judicial activism and how can we measure it?). Baxi seems to suggest that there can be no objective determination of whether or not a decision is an instance of judicial activism: "Judges are evaluated as activists by various social groups in terms of their interests, ideologies and values Quite often, the label is attached to a judge who may herself not consider herself as an activist."³¹ This view, at some level, conflicts with the philosophy behind the Cohn-Kremnitzer model which attempts to do exactly what Baxi believes cannot be done – arrive at an objective assessment of judicial activism.

Notwithstanding his view that an objective assessment of judicial activism is problematic, Baxi does provide a definition for an activist judge: one that pays close attention to issues of governance and

28. UPENDRA BAXI, *THE INDIAN SUPREME COURT AND POLITICS* (1980) (hereinafter, BAXI, *Supreme Court and Politics*); UPENDRA BAXI, *COURAGE, CRAFT AND CONTENTION: THE INDIAN SUPREME COURT IN THE EIGHTIES* (1985) (hereinafter, BAXI, *Courage, Craft and Contention*).

29. BAXI, *Courage, Craft and Contention*, *supra* note 28, at 2-3.

30. *Id.* at 3.

31. *Id.* at 7.

political development. Thus, "an activist judge is a person who has disappointed the expectations of the governing elite which put her in the judgment seat."³² Baxi himself is well aware of the limitations of this definition, recognizing that a non-activist judge may well produce the same disappointment.³³ To resolve this, Baxi enhances his definition of activism and links it to the notion of power: "[a]ctivism is that way of exercising judicial power which seeks fundamental re-codification of power relations among the dominant institutions of state, manned by members of the ruling class."³⁴ This definition of activism appears complex. Analyzed closely, for a decision to be regarded as activist it must *seek* a *fundamental* alternation of the power relations in society, whether or not it eventually ends up achieving the same. Activism then, according to Baxi, has more to do with what a decision intends to do (or *seeks* to do) rather than what it actually does. Baxi seems to place the threshold for a decision to be activist extremely high – a *fundamental recodification of power relations among dominant institutions of state*. Consequently, Baxi's definition is limited to those decisions that relate to issues of power and social hierarchy. But could other decisions not be activist? For example, *Shaikh Salim Haji Abdul Khayumsab v. Kumar*,³⁵ which will be subsequently examined, appears to be an activist decision despite the fact that it results in no fundamental alteration of power relations in society. Interestingly, Baxi's definition of activism has little to do with how a judge interprets a particular legal provision *per se*, and focuses instead on the intended result of particular legal interpretation.

Several of the issues that Baxi deals with in relation to judicial activism are those that are socio-political in nature. For example, rather than merely asking whether judicial activism is a problem, Baxi takes the issue a step further and delves into the subject of whom it is likely to be a problem for.³⁶ According to Baxi, it is a problem for the "managers of the people" because judicial activism is an answer to many of the problems of those who are managed.³⁷ Baxi's view, that judicial activism is a problem for a certain elite in society, can perhaps be traced to the fact that judicial activism in the 1980s in India arose

32. BAXI, *Courage, Craft and Contention*, *supra* note 28, at 8.

33. *Id.*

34. *Id.* at 10.

35. (2006) 1 S.C.C. 46 [hereinafter, *Shaikh Salim*].

36. BAXI, *Courage, Craft and Contention*, *supra* note 28, at 15.

37. *Id.*

in response to the lawlessness of the state. Thus the activism that took place during this period, could at a very general level, be understood as existing for the benefit of the common man. Despite this, Baxi does recognize that all instances where a decision has benefitted the people need not have been an instance of judicial activism, and the judge in question may not have been an activist judge. For example, he concedes that Justice Khanna was not an activist judge in terms of “militant use of judicial power in service of fundamental rights” but nonetheless his dissent in the *habeas corpus* case³⁸ during India’s infamous Emergency in the 1970s³⁹ does stand out from a human rights perspective.⁴⁰ This conclusion is important because it shows that while *all* decisions that benefit the common man *may not* be activist, *no* decision can be activist *unless* it benefits the common man.

Baxi’s appreciation of the liberal approach to human rights demonstrated by the Indian Supreme Court in the late 1970s and early 1980s is evidenced by his paper “Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India” where he professed that social action litigation had led to the Supreme Court of India finally becoming “the Supreme Court for Indians.”⁴¹ Baxi was referring to the relaxation of standing rules by the Indian Supreme Court, which had declared the right of “every citizen”⁴² and any “member of the public acting *bona fide*”⁴³ to approach the court in the public interest. This form of representative litigation was, and continues to be, referred to by most commentators as “public interest litigation,” although Baxi preferred the usage of the term “social

38. ADM Jabalpur v. Shiv Kant Shukla, (1976) 2 S.C.C. 521; see GRANVILLE AUSTIN, WORKING A DEMOCRATIC CONSTITUTION: A HISTORY OF THE INDIAN EXPERIENCE 334-43 (1999) (hereinafter AUSTIN, *Democratic Constitution*).

39. Between 1975-77, the Indian government declared a national emergency in what is regarded as one of the darkest periods in India’s political history, replete with examples of human rights violations. For a further account of the emergency, see, e.g., BIPAN CHANDRA, IN THE NAME OF DEMOCRACY: JP MOVEMENT AND THE EMERGENCY (2003). For a more personal account of the then Prime Minister Indira Gandhi during this period, see KATHERINE FRANK, INDIRA 371-414 (2001).

40. BAXI, *Courage, Craft and Contentions*, *supra* note 28, at 7; BAXI, *Supreme Court and Politics*, *supra* note 28, at 79-120.

41. Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, in JUDGES AND THE JUDICIAL POWER: ESSAYS IN HONOUR OF JUSTICE V.R. KRISHNA IYER 289 (Rajeev Dhavan et al. eds., 1985) [hereinafter, BAXI, *Taking Suffering Seriously*].

42. D.C. Wadhwa v. State of Bihar, (1987) 1 S.C.C. 378, 383.

43. Bandhua Mukti Morcha v. Union of India, (1984) 3 S.C.C. 161, 187.

action litigation.” At this stage, Baxi’s conception of social action litigation was a romantic and optimistic one:

[T]o me the future of social action litigation looks bright. The future of law in India is partly, but vitally, linked to the future of social action litigation because through it great and unending injustices and tyranny begin to hurt the national conscience and prod at least one major institution of governance to take people’s miseries seriously.⁴⁴

This fondness towards judicial activism and social action litigation continued in the early 1990s. In his paper “Judicial Discourse: Dialectics of the Face and the Mask”, Baxi noted that judicial activism was “a struggle for the recovery of the Indian Constitution” and that the judicial interventions had led to accountability in governance.⁴⁵ Introducing public interest litigation (or social action litigation) and passing a series of judgments that spurred the creation of human rights jurisprudence in India, Baxi’s analysis of judicial activism in the Indian Supreme Court must be contextualized with respect to the Supreme Court’s role and position at the time. In positing views such as how judicial activism was a problem for the “managers of the people” that sought to alter power structures in society, and by dealing with issues such as governance and accountability, Baxi’s works are better understood as a reflection of the Supreme Court in the late 1970s-1990s, rather than as a general theory on judicial activism. While Baxi may have supported the Supreme Court’s decision to “take suffering seriously” by relaxing the rules of *locus standi* and emphasizing individual rights, his later writings demonstrate a radical shift from this position.

Baxi’s paper “The Avatars of Indian Judicial Activism: Explorations in the Geographies of [In]justice,” published at the turn of the century, clarifies and articulates his position on judicial activism. Baxi suggests here that the Supreme Court’s activism of the 1980s and 1990s marked the dialectics not only of “euphoria,” which has been examined above, but also of “disenchantment as well as constitutional chaos.”⁴⁶ Baxi now appears to have tempered his initial enthusiasm and accepts that “judicial activism is at once a peril and a

44. BAXI, *Taking Suffering Seriously*, *supra* note 41, at 306.

45. Upendra Baxi, *Judicial Discourse: Dialectics of the Face and the Mask*, 35 J. INDIAN L. INST. 1, 12 (1993).

46. Upendra Baxi, *The Avatars of Indian Judicial Activism: Explorations in the Geographies of [In]justice*, in FIFTY YEARS OF THE SUPREME COURT OF INDIA: ITS GRASP AND REACH 157 (S.K. Verma et al. eds., 2000).

promise,” and that “if India . . . furnishes an exemplary archive of judicial activism, it also provides extraordinary narratives of the failure, as it were, of the adjudicatory nerve, in those very arenas where activist adjudicatory power should be felt most at home.”⁴⁷ This balanced view is followed by an interesting distinction that Baxi puts forth between an “active” and an “activist” judge:

An *active* judge regards herself, as it were, as a trustee of state regime power and authority. Accordingly, she usually defers to the executive and legislature; shuns any appearance of policy-making; supports patriarchy and other forms of social exclusion; and overall promotes “stability” over “change.” In contrast, an *activist* judge regards herself as holding judicial power in fiduciary capacity for civil and democratic rights of all peoples, especially the disadvantaged, dispossessed, and the deprived.⁴⁸

This distinction appears to reinforce the view taken in Baxi’s earlier works, that activism on behalf of a judge is assessed according to the issues he is concerned with (e.g., accountability in governance and human rights) rather than with reference to the specific legal issues involved, the rules in question, and the manner in which the concerned judge interprets those rules. A judge could, potentially, pass a decision that supports patriarchy and other forms of social exclusion, and such a decision may well be activist if one chooses to focus on how the canons of legal interpretation have been followed by the concerned judge.

A further issue arises in decisions that may not fall into either of the two categories provided by Baxi. For example, in *Shaikh Salim Haji Abdul Khayumsab v. Kumar*,⁴⁹ the issue related to whether Order 8, Rule 1 of the Code of Civil Procedure, 1908,⁵⁰ was mandatory or merely directory in nature. This provision deals with the time period that a defendant has to file a written statement in his defense. It allows for a period of thirty days from the date of service

47. *Id.* at 161.

48. *Id.* at 165.

49. *Shaikh Salim*, *supra* note 35.

50. Order 8, rule 1 of the India Code of Civil Procedure 1908, reads: Written Statement – The defendant shall, within thirty days from the date of service of summons on him, present a written statement of his defence [sic]: Provided that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the same on such other day, as may be specified by the Court, for reasons to be recorded in writing, but which shall not be later than ninety days from the date of service of summons.

of summons to file the statement. In the event that the defendant is unable to file the written statement within thirty days, he can file the same at a later date "as may be specified by the court," but this date "shall not be later than ninety days from the service of summons." Despite what emerges from a literal interpretation of the provision ("shall not be later"), by applying the principles that an act of court shall prejudice no man and that the law does not compel a man to do what he cannot possibly perform, the Supreme Court of India held that Order 8, Rule 1 was directory in nature. The Court held that the provision does not take away the power of the court to take a written statement on record even after ninety days, and that the provision merely casts an obligation on the defendant to file his written statement within the time provided for.⁵¹ In doing so, the Court ignored precedents emphasizing the usage of the literal rule as the primary rule of statutory interpretation unless the language of the provision is contradictory, unclear or leads to an absurdity.⁵² Undeniably, this case is one where Pasayat J. went beyond the basic reading of the provision, which clearly impose a mandatory condition. Was Pasayat J. being activist in this decision, or was he being merely active? An examination into the characteristics provided by Baxi that constitute these two categories reveals that Pasayat J. fits into neither category, and thus Baxi's analysis does not demonstrate how judicial behavior in cases such as *Shaikh Salim Haji Abdul Khayumsab* ought to be characterized.

In his most recent writing on judicial activism (published as a preface to S.P. Sathe's, *Judicial Activism in India*),⁵³ Baxi draws a distinction between different types of judicial activism in India. The two types of activism, which he discusses in detail, and are examined in Sathe's book, are "reactionary" activism and "progressive" activism.⁵⁴ Reactionary judicial activism is associated with instances of activism where the judiciary reacts to particular political and social

51. This case seems to be a remarkably apt example of Ronald Dworkin's discussion on how judges go beyond rules and make use of principles in adjudication. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 14-45 (1977); see also generally Scott J. Shapiro, *The "Hart-Dworkin" Debate: A Short Guide for the Perplexed*, in RONALD DWORKIN 22 (Arthur Ripstein ed., 2007).

52. See, e.g., *G. Narayanaswami v. G. Pannarselvam and Others*, (1972) 3 S.C.C. 717 (holding that courts should depart from the plain meaning of words or a literal construction only if the same results in a patent absurdity).

53. Upendra Baxi, *Preface*, in SATHE, *Transgressing Borders*, *supra* note 10 (hereinafter, Baxi, *Preface*).

54. Baxi, *Preface*, *supra* note 53, at xiii.

situations. Thus, the Nehruvian era activism that dealt with issues such as land reform and the right to property, and the pro-Emergency activism in the 1970s are examples of this kind of activism.⁵⁵ Progressive judicial activism alternatively, according to Baxi, is the kind of judicial activism relating to social action litigation (or public interest litigation). Interestingly, Baxi's comments in the preface to *Judicial Activism in India* appear to have little faith in progressive judicial activism, and thereby mark an important shift from his earlier writings that seems to praise this kind of activism:

This book [*Judicial Activism in India*] illustrates how fragile as well as fractured progressive activism is. It is so for many reasons already stated here. It must so remain because most Indian justices, like other constitutional classes have limited powers of understanding social/human suffering, and limited stamina to take it seriously. For the most part they remain willing to strike but afraid to wound errant state plenipotentiaries.⁵⁶

Considering this view, the conclusion that forms is that social action litigation and the Supreme Court's urge to play an active part in Indian governance has not, for Baxi, lived up to the potential he expected in the 1970s.⁵⁷ Baxi acknowledges his initial support but argues that even though he grandly described the movement, he was aware of the "dynamics of disenchantment." Why has social action litigation failed or progressive judicial activism not performed as one may have hoped? This question is vital, and one hopes that Baxi will provide a comprehensive answer. Unfortunately though, Baxi's answer is more philosophical than legal: "Justices are human, all too human. Their capacities for self-learning, individual as well as institutional, fluctuate."⁵⁸ Interestingly, Baxi focuses on the limitations of judges as human beings rather than the limitations of courts as institutional structures of a certain kind. Considering Baxi's emphasis on socio-economic rights, it may well have been more appropriate for him to focus on the latter.⁵⁹ Baxi seems to expect so

55. *Id.* at xiv.

56. *Id.* at xiv.

57. There are other types of activism as well, notes Baxi, such as "eclectic" activism and "opportunistic" activism. However, he does not provide details of these types of activism though he considers the latter is 'unworthy of mention' and the former deals with judicial intervention at certain times and abstention in other times. *Id.* at xiii.

58. Baxi, *Preface*, *supra* note 53, at xvii.

59. The institutional limitations of courts form an integral part of the debate concerning the judicial enforcement of socio-economic rights. *See generally* Arun

much from courts in terms of their ability to provide social justice, that it begs the question how such a role can be practically conceivable and theoretically justified.⁶⁰

Baxi places considerable emphasis on whether judicial decisions promote human rights and benefit the common man, and it is only in such decisions that traces of activism are to be found. A shift is revealed from his early writings which support and commend the approach of the Indian Supreme Court to his later writings that appear rooted in disappointment with the manner in which judicial activism has in fact played out. Even though Baxi has contributed to the judicial activism scholarship in India, there are certain questions that remain insufficiently addressed. Importantly, Baxi provides no general framework that enables us to understand which decisions ought to be characterized as activist. Although certain parameters are provided (whether the decision furthers individual rights or alters social hierarchy), such parameters appear to focus too greatly on narrow questions and invite certain criticisms. First, they provide no assistance in assessing the activist content of private law cases. While in certain private law cases they may be applied, their applicability seems limited to public law cases. Second, even in public law adjudication, there is no yardstick to judge when a decision is in fact furthering the cause of human rights. Third, and perhaps most significantly, Baxi's definition of activism does not consider the manner in which a judge interprets the relevant legal provisions in question, and only focuses on the decision's intent to play a socially transformative role. Consequently, a decision that fails to follow both precedent as well as the standard rules of statutory interpretation, but

Kumar Thiruvengadam, *The Social Rights Jurisprudence of the Supreme Court of India from a Comparative Perspective*, in HUMAN RIGHTS, CRIMINAL JUSTICE AND CONSTITUTIONAL EMPOWERMENT 264, 274 (K. Chockalingam & C. Raj Kumar eds., 2007) (noting that arguments against socio-economic rights adjudication can be divided into two dimensions: the legitimacy dimension and the institutional dimension); see also E.C. Christiansen, *Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court*, 38 COLUM. HUM. RTS. L. REV. 321, 321-22 (2007) (observing that "[i]t has historically been argued and traditionally accepted that...Judges and courts...lack the political legitimacy and institutional competence to decide" matters concerning socio-economic rights); FREDMAN, *Human Rights Transformed*, *supra* note 5, at 92 (observing that enforcing positive duties "is said to be beyond the institutional capabilities of a court").

60. As Gadbois seems to rightly point out, "[o]ne must seriously question whether any constitutional court, in either institutional or personnel terms, is adequate to the tasks Baxi would wish the Indian Court to perform." See G. Gadbois, Book Review, 75 AM. POL. SCIENCE REV. 523, 524 (1981).

does not promote human rights, will not be considered activist. Certain limitations in Baxi's vision of judicial activism arise from his rejection of the doctrine of separation of powers, and this limits the universality of this theory. According to Baxi the theory of separation of powers is a first world theory that cannot be automatically replicated in the third world: "[w]hatever may be said in the First World concerning this kind of lawmaking by judges . . . it is clear that in almost all counties of the Third World such judicial initiatives are both necessary and desirable"⁶¹

Nor can an effective framework to assess the activist nature of decisions be found in the discourse presented by other notable Indian legal scholars. S.P. Sathe, for example, provides amongst the most comprehensive studies of judicial activism in India in recent times. According to Sathe:

Judicial activism is not an aberration. It is an essential aspect of the dynamics of a constitutional court. It is a counter-majoritarian check on democracy. Judicial activism, however, does not mean governance by the judiciary. Judicial activism must also function within the limits of the judicial process. Within those limits, it performs the function of stigmatizing, as well as legitimizing, the actions of the other bodies of government – more often legitimizing than stigmatizing.⁶²

Yet, Sathe does provide any rigorous analysis of the meaning of the term "judicial activism" and focuses more on its historical development in independent India. In his book, *Judicial Activism in India*, Sathe tackles a broad range of issues, from how initial judicial activism was influenced by the political climate at the time (more specifically, the Emergency during Indira Gandhi's time) to the relationship between secularism and judicial activism. While Sathe does evaluate issues such as the legitimacy of judicial activism, he does not concern himself with any thorough analysis of how judicial activism may be defined or measured. Thus, while the entire book is devoted to studying judicial activism, none of it is spent examining what activism means. It proceeds on the presumption that the term is understood. It is clear however that like Baxi (at least the early Baxi), Sathe is in support of the "larger role" that the judiciary has

61. Upendra Baxi, *On the Shame of Not Being an Activist: Thoughts on Judicial Activism*, 11 INDIAN BAR REV. 259, 265 (1984).

62. SATHE, *Judicial Activism*, *supra* note 10, at 106.

assumed in recent decades.⁶³ Similarly, Sathe also links activism to power relations and argues that positive judicial activism is that which brings about social change.⁶⁴ Another distinguished Indian scholar Rajeev Dhavan also commends the role that the judiciary occupies in India today: “[a]s India meets the challenge of a billion mutinies that animate and plague its life every day, the judiciary is not just the lesser evil but a crucial ingredient of the democratic process by which India is governed.”⁶⁵ Dhavan, like Baxi and Sathe, also tackles a broad range of issues on the working of the Indian Supreme Court. He has made significant contributions to the discourse in several public law areas such as the basic structure doctrine (through which the Indian Supreme Court limited Parliament’s power to amend the Constitution),⁶⁶ public interest litigation,⁶⁷ the adjudication of human rights in India,⁶⁸ and even affirmative action for women in Parliament.⁶⁹ Yet, Dhavan also does not engage in a meticulous analysis of the meaning of judicial activism and the manner in which it may be measured. Political commentators, who view the approach of the Indian Supreme Court with concern and note that it has “implications for democracy that are both positive and problematic,”⁷⁰ also do not delve into this issue. This gap in the judicial activism discourse is curious, and it is difficult to divine its reasons. One plausible explanation seems to be that scholars have concerned themselves with much broader issues of judicial power and the ability of courts to deliver social justice. It may be the case that

63. See generally S.P. Sathe, *Supreme Court and NBA*, 35 ECON. & POL. WKLY. 3990, 3994 (2000) (noting the Narmada decision was unfortunate as it demonstrated that the Supreme Court had stepped back from its larger role) [hereinafter, Sathe, *NBA*]. Although, Sathe argues, that unlike Baxi, he does not believe that the Indian Supreme Court has become a “Supreme Court for Indians.”

64. SATHE, *Transgressing Borders*, *supra* note 10, at 5-6. But note Sathe does acknowledge that “whether it is positive or negative activism depends upon one’s own vision of social change.” *Id.*

65. Rajeev Dhavan, *Judges and the Indian Democracy: The Lesser Evil?*, in *TRANSFORMING INDIA: SOCIAL AND POLITICAL DYNAMICS OF DEMOCRACY* 340 (F.R. Frankel et al. eds., 2000).

66. See RAJEEV DHAVAN, *SUPREME COURT AND PARLIAMENTARY SOVEREIGNTY* (1976) (hereinafter, DHAVAN, *Parliamentary Sovereignty*).

67. See Rajeev Dhavan, *Law as Struggle: Public Interest Litigation in India*, 36 J. INDIAN L. INST. 302 (1994).

68. See Rajeev Dhavan, *Promises, Promises...: Human Rights in India*, 39 J. INDIAN L. INST. 149 (1997).

69. See Rajeev Dhavan, *Reservations for Women: The Way Forward*, 20 NAT’L L. SCH. INDIA REV. 1 (2008).

70. METHA, *The Rise of Judicial Sovereignty*, *supra* note 1, at 70.

the unique social, political and historical climate of India makes discussions of social justice, poverty alleviation and development more relevant. Unfortunately, however, a major consequence of this, and of the limited engagement by Indian scholars with the term “judicial activism,” has meant that judicial decisions in India are never perceived as activist in certain ways and restrained in others. They are branded – often carelessly – one way or the other.

III. The Cohn-Kremnitzer Model and the Indian Supreme Court

Ronald Dworkin once remarked that “the courts are the capitals of law’s empire, and judges are its princes, not its seers and prophets.”⁷¹ It is difficult to understand, however, when judges may be performing each of these roles. Often the answer turns on one’s preferences and prejudices, i.e., the actions of a judge are criticized because one doesn’t agree with them, and not so much because the judge *ought* to have acted differently. The above part demonstrated how the current discourse on judicial activism in the Indian Supreme Court has not been particularly instructive on what judicial activism is and how we can measure it. If we are to arrive at a greater understanding of judicial behavior, we need a mechanism that would enable us to do so.

A. The Cohn-Kremnitzer Model of Judicial Activism

The Cohn-Kremnitzer model is an attempt to provide us with the tools to understand the activist quotient of judicial decisions. Although few scholars have examined this issue in detail, there have been prior attempts similar to the one undertaken by Cohn and Kremnitzer. Amongst the most notable of these, and one that Cohn and Kremnitzer build on, is the model put forth by Bradley Canon.⁷² Canon sets forth a variety of factors necessary to understand judicial activism, in addition to the commonly used factor – majoritarianism. Cohn and Kremnitzer’s model is an impressive development on Canon’s model, and central to it is the belief that activism is a function of several factors, each of which require individual assessment and due consideration. Cohn and Kremnitzer develop

71. RONALD DWORKIN, *LAW’S EMPIRE* 407 (1986).

72. See B.C. Canon, *A Framework for the Analysis of Judicial Activism*, in *SUPREME COURT ACTIVISM AND RESTRAINT* 385 (Stephen C. Halpern & Charles M. Lamb eds., 1982).

seventeen parameters, which they believe merit reflection in order to arrive at the activist quotient of a decision. These seventeen factors are divided into three categories, depending on their relationship with the three functions that Cohn and Kremnitzer suggest constitutional adjudication performs.⁷³ The first of these is fairly uncontroversial, and is the function traditionally regarded as being the primary objective of the judiciary: the resolution of disputes.

Under this first category, the Cohn-Kremnitzer model populates a list of twelve parameters. The first of these is "judicial stability" which is measured by the extent to which a decision deviates from the previous legal position. This parameter, hence, incorporates the common law doctrine of precedent, and decisions that diverge from precedent are regarded as more activist as compared with those that stay true to the established legal position. The second parameter under this category is "interpretation." Decisions that conform to the original intent or literal linguistic meaning of a provision are regarded as less activist than those that adopt a purposive interpretation. Despite the supporting literature in favor of originalism and textualism,⁷⁴ whether or not it is the ideal model of constitutional interpretation remains a matter of significant debate. For example, according to Strauss, "The common law approach restrains judges more effectively, is more justifiable in abstract terms than textualism or originalism, and provides a far better account of our practices."⁷⁵ The Cohn-Kremnitzer model rightly refrains from delving into this issue. It makes no judgment on whether judges should employ textualism or originalism, and on which model of constitutional law interpretation is the most desirable. It merely suggests that judges who place less reliance on a purposive interpretation are to be regarded as less activist, and leaves the merits of a purposive interpretation for another debate.

The next six headings under this category cover a broad range of issues, each of which represents an uncontroversial and commonly adopted yardstick from which to assess activism. Under

73. Cohn & Kremnitzer, *Judicial Activism*, *supra* note 11, at 340-53.

74. See, e.g., Antonin Scalia, *Common Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3 (Amy Gutmann ed., 1997); see also generally KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION* (1999).

75. David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 879 (1996).

“majoritarianism and autonomy,” courts that impede the democratic process (for example, by interfering with policy or providing alternate solutions to those of the government) are regarded as more activist as compared with those that defer to the legislature or executive. Again, Cohn and Kremnitzer pass no judgment on whether this is desired; the model merely measures. Next, the parameter “judicial reasoning: process/substance” analyzes whether a decision relies more on strict grounds of procedure, or on “open-ended” (and perhaps vague) grounds of substance. The former results in a lower degree of activism as compared with the latter. The next heading “‘threshold’ activism” looks at whether courts are prepared to relax rules on standing, delays, justiciability, and so on (thereby also assessing reliance on strict procedure). Cohn and Kremnitzer point out that, more than in the case of other parameters in the model, the assessment in this case is likely to turn greatly on the subject matter of the case. Hence, if the court relaxes such standards, particularly in a controversial or sensitive matter, it will exhibit a high degree of activism. Thus, the decision of the Indian Supreme Court in *Shaikh Salim Haji Abdul Khayumsab*,⁷⁶ examined previously, demonstrated “threshold activism” by the Court’s willingness to relax the law on delays. It should be noted that one is not entirely certain as to the extent to which the activist quotient would vary depending on the sensitive nature of the decision, the threshold activism being constant. Our next parameter “judicial remit” regards decisions that increase the scope of judicial review as activist. Under the headings “rhetoric” and “*obiter dicta*,” decisions that exhibit extralegal rhetoric and pronounce views on issues beyond the specific question of case are as highly activist.

The ninth parameter under the first category of the Cohn-Kremnitzer model is the “reliance on comparative sources.” Cohn and Kremnitzer regard decisions that rely on foreign law to be more activist than those that rely on domestic law. This conclusion is interesting, and unfortunately Cohn and Kremnitzer do not provide a detailed account for its reasons. The usage of foreign law by constitutional courts has become an important facet of public law adjudication, and has sparked a great deal of debate.⁷⁷ As a result of a

76. *Shaikh Salim*, (2006) 1 S.C.C. 46.

77. See generally Sarah K. Harding, *Comparative Reasoning and Judicial Review*, 28 YALE J. INT’L. L. 409 (2003) (examining the borrowing of judicial doctrines between Canada and the United States); THE MIGRATION OF CONSTITUTIONAL IDEAS (Sujit Choudhry ed., 2006); Cheryl Saunders, *The Use and Misuse of*

wide range of foreign sources available, courts can often buttress their arguments by the reliance on foreign law notwithstanding the nature of their argument. Further, because foreign sources are not binding, their reliance may take place in an undisciplined manner.⁷⁸ Two recent examples from the Indian constitutional experience are illustrative. In *Anuj Garg v. Hostel Association of India*,⁷⁹ the Indian Supreme Court borrowed strict scrutiny from American constitutional law holding that “protective discrimination” legislations must be assessed with reference to whether interferences with personal freedom are (a) justified in principle, and (b) appropriate in measure.⁸⁰ In *A.K. Thakur v. Union of India*,⁸¹ however, a decision only a few months after *Anuj Garg*, the Indian Supreme Court refused to apply this test, noting that this American constitutional doctrine found no place within Indian law.⁸² The Cohn-Kremnitzer model would argue that *A.K. Thakur* is a less activist than *Anuj Garg* because it refused to incorporate a foreign legal principle and relied on domestic law. However, because of the problems with comparative reliance discussed above, in certain cases courts may use comparative sources to support professed judicial restraint in cases where the domestic law provides unclear or contradictory answers. For example, in the recent case of *Divisional Manager, Aravali Golf Club v. Chander Hass*, the Indian Supreme Court emphasized the importance of judicial restraint and relied on several foreign authorities to outline the limited role of the judiciary in democratic

Comparative Constitutional Law, 13 IND. J. GLOBAL LEGAL STUD. 37 (2006); Cheryl Saunders, *Comparative Constitutional Law in Courts: Is There a Problem*, in CURRENT LEGAL PROBLEMS 91 (Jane Holder & Colm O’Conner eds., 2007) (suggesting that greater engagement is required with the methodology that courts must adopt while relying on foreign sources); Robert Reed, *Foreign Precedent and Judicial Reasoning: The American Debate and the British Practice*, 124 L. Q. REV. 253 (2008) (examining the practice of British courts relying on foreign domestic law).

78. See *Roper v. Simmons*, 543 U.S. 551, 627 (2005) (Scalia, J., dissenting) (arguing that “[t]o invoke alien law when it agrees with one’s own thinking and ignore it otherwise, is not reasoned decision-making, but sophistry”).

79. (2008) 3 S.C.C. 1.

80. *Id.* ¶¶ 48, 50.

81. 2008 S.C.A.L.E. 1.

82. See Sudhir Krishnaswamy & Madhav Khosla, *Reading AK Thakur vs. Union of India: Legal Effect and Significance*, 43 ECON. & POL. WKLY. 53, 59 (2008) (discussing problems with the Court’s rationale in rejecting the strict scrutiny test). For a detailed analysis of the decisions in *Anuj Garg* and *A.K. Thakur*, see generally Tarunabh Khaitan, *Beyond Reasonableness – A Rigorous Standard of Review for Article 15 Infringement*, 50 J. INDIAN L. INST. 177 (2008).

societies.⁸³ In this scenario, was the reliance on foreign law in *Aravali Golf Club* an act of judicial restraint or judicial activism? “Reliance on comparative sources” is a vital element to constitutional adjudication, and is necessary to consider when one debates the activist quotient of decisions. However, because of its wide availability and non-binding nature, comparative sources give courts the power to rely on them inconsistently and often to support any point of view. Perhaps the reliance on comparative sources ought to be judged by a greater examination of the nature of sources that are relied upon. This may serve to accurately assess judicial behavior as compared with a strict determination that the reliance on foreign law is more activist than the reliance on domestic law.

The next three headings in the first category of the Cohn-Kremnitzer model are “judicial voices,” “extent of decision,” and “legal background.” The first, “judicial voices,” relates to the extent of concurring opinions, and the greater the concurrence between judges, the lower the activism. The second, “extent of decision,” deals with the impact of the decision. If the decision is meant to apply strictly to a narrow set of scenarios, the decision would be less activist as compared with one which has a wide application. Finally, “legal background” examines the legal provisions that are at issue in the case. It studies whether the provisions are clear and unambiguous, or whether they are vague and deficient. In cases where rules are insufficient, courts will need to be imaginative and adopt other canons of interpretation, thereby illustrating a high degree of activism. An analysis of the relevant legal provisions in a particular decision is central to determining whether or not the decision is activist.

These twelve parameters provide a comprehensive guide to assessing judicial activism when the judiciary performs its function of dispute resolution. However, it is trite to state that the judicial role is not limited to exercising this function; in public law adjudication, constitutional courts have a much larger role to play.⁸⁴ As Professor

83. 2007 S.C.A.L.E 1. The decision in *Aravali Golf Club* has been one of several recent decisions where the Indian Supreme Court has emphasized judicial restraint, particularly with respect to public interest litigation. For more on the India Supreme Court's recent approach, see Madhav Khosla, *Bitter PIL*, INDIAN EXPRESS, Nov. 18, 2008 available at <http://www.indianexpress.com/news/bitter-pil/386940/1> (last visited Nov. 20, 2008).

84. See, e.g., INDIAN CONST. art. 131(“[S]ubject to the provisions of this Constitution, the Supreme Court shall, to the exclusion of any other court, have original jurisdiction in any dispute – (a) between the Government of Indian and one

Chayes once noted, "the dominating characteristic of modern federal litigation is that lawsuits do not arise out of disputes between private parties about private rights. Instead, the object of litigation is the vindication of constitutional or statutory policies" and may be termed as "public law litigation."⁸⁵ Since the resolution of disputes cannot account for all types of litigation, particularly "public law litigation," the Cohn-Kremnitzer model goes beyond dispute resolution and delves into the issue of what other functions are performed by the judicial branch. The second category described by Cohn and Kremnitzer regards the judiciary as a player that "operates in the public sphere as a participant in a network of actors, comprising other government branches, individuals and civic bodies."⁸⁶ As the authors note, arguing that the judiciary serves a function as a party in a constitutional dialogue with others branches of government means that they "reject visions of the omnipotence of the third branch."⁸⁷ The existence of this vision in the model is driven by the belief that it is necessary to locate decisions in their social context. Evaluating judicial decisions without reference to the reaction they receive has, according to Cohn and Kremnitzer, two shortcomings: it regards courts as the final word on a particular issue, and it does not account for its role as a direct participant in a constitutional dialogue.⁸⁸ Professor Tushnet's recent discussions on "dialogic judicial review,"⁸⁹ as well as the emerging literature on experimentalist governance systems,⁹⁰ are built on a vision of constitutional dialogue between

or more States; or (b) between the Government of India and any State or States or one side and one or more States on the other; or (c) between two or more States, if and in so far as the dispute involves *any question (whether of law or fact) on which the existence or extent of a legal right depends...*" (emphasis added); INDIAN CONST. art. 132 ("[A]n appeal shall lie to the Supreme Court from any judgment, decree or final order of a High Court...if the High Court certifies...that the case involves *a substantial question of law as to the interpretation of the Constitution...*") (emphasis supplied). For a defense of this larger judicial role, see, e.g., RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996).

85. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976).

86. Cohn & Kremnitzer, *Judicial Activism*, *supra* note 11, at 335.

87. *Id.*

88. *Id.* at 343.

89. See generally Mark Tushnet, *Dialogic Judicial Review*, 61 ARK. L. REV. 205 (2008); see also generally Mark Tushnet, *Social Welfare Rights and the Forms of Judicial Review*, 82 TEX. L. REV. 1895 (2004).

90. See Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998); Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L.

different branches of government. The critical question for consideration under this category is whether or not the decision finds support in society, i.e., whether the views of the judges match the views of the people. Thus, to use Cohn and Kremnitzer's illustration, if a decision is regarded as a welcome change in society it would not be regarded as activist, and if on the other hand, the same decision is opposed by members of society and "other members of the constitutional network,"⁹¹ a higher degree of activism would have to be associated with the decision.

Under this second category, there are four parameters through which the model suggests we measure judicial activism. The first of these is the reaction of the legislature. If the legislature undertakes measures to overturn the decision, then the decision is regarded to possess a higher degree of activism as compared with legislative affirmation of the decision. Often, there is no legislative response to a particular decision. Such cases, as Cohn and Kremnitzer rightly note, are likely to signify acceptance with the decision and should thus be regarded as instances of a median degree of activism.⁹² The next parameter under this vision of judicial activism assesses the administrative or executive response to the decision, essentially by examining its compliance. The greater the compliance, the less is the degree of activism. Thirdly, the judicial reaction to the decision is considered. One should note how in the previous category of the model, a study was undertaken of the extent to which the decision falls in line with previous decisions; the judicial reaction parameter studies the extent to which future decisions fall in line with the decision in question. The greater the affirmation of the decision in subsequent cases, the less is the extent of activism. Finally, in performing its function as a player in a constitutional dialogue, the judiciary's decision is examined with reference to the public reaction the decision receives. A high level of disapproval by civil society forces will signify a high activist quotient, and similarly social acceptance of the decision will mean that the decision should not be

REV. 1016 (2004); Alana Klein, *Judging as Nudging: New Governance Approaches for the Enforcement of Constitutional Social and Economic Rights*, 39 COLUM. HUM. RTS. L. REV. 351 (2008).

91. Dorf & Sabel, *supra* note 90, at 336.

92. It is interesting to note here Calabresi's thesis is that contrary to being counter-majoritarian, Congress permits and accepts the judiciary's indulgence in judicial activism to allow it to frame policies which it tacitly supports. This also supports the conclusion that the legislature is in favor of decisions to which it makes no response. See Calabresi, *Judicial Activism*, *supra* note 19.

viewed as activist.

The third function that a judiciary performs, according to Cohn and Kremnitzer, is to protect core constitutional values – and decisions that do so are not to be regarded as activist. The inclusion of this function in the model rests on the assumption that “purely value free judicial decision-making is not only impossible, but also untenable.”⁹³ Naturally, the question arises as to how such core values are to be determined. It would seem that they are likely, in most cases, to turn on one’s interpretation, and perhaps even preference. Cohn and Kremnitzer foresee this criticism, and argue that while it may be valid in general, it is largely inapplicable to their model. The reason being that Cohn and Kremnitzer limited their scope to a narrow range of core values, which they believe “remain uncontested in constitutional arenas.”⁹⁴ Reflecting on the literature that identifies core constitutional values, Cohn and Kremnitzer unfortunately do not advance their own version of core values, although they seem to endorse values such as equality, liberty, and human dignity as being “core.” One issue that appears to emerge from this aspect of the model is scholars often disagree on the conception of a core value. Even if there is a consensus on which core values underlie legal systems, there may be disagreement on what that particular core value means. In the case of equality, for example, there are radically distinct positions on the meaning of equality – and inequality.⁹⁵ For example, one may imagine a case where an affirmative action measure is under challenge. One judge may uphold the measure, and another may strike it down, and both may do so, in fact are likely to do so, in furtherance of protecting the core value of equality. In this situation, one possible way to proceed may be to treat a decision that protects core values as not activist, irrespective of the conception of the core value it protects. Therefore, the judge that upholds an affirmative action measure and the judge that strikes it down will both not be regarded as activist if both acted in order to protect the core value of equality. At any rate, this brief discussion on the third function of the judiciary, and Cohn

93. Cohn & Kremnitzer, *Judicial Activism*, *supra* note 11, at 348.

94. *Id.* at 349.

95. See AMARTYA SEN, *INEQUALITY REEXAMINED* 12-30 (1992); AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 58-67 (2000); see generally Ronald DWORKIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* (2000) (examining in detail competing theories on equality such as the equality of welfare, the equality of resources, the equality of capabilities, and so on).

and Kremnitzer's own admission of many of the issues discussed here, makes it clear that this particular aspect of the model requires much greater debate and discussion. The same holds true for the inclusion of the second function of the judiciary in the model, as there is by no means consensus on the view that the judiciary must play a role as a participant in a constitutional dialogue. In addition to these concerns, there are others that arise with respect to the Cohn-Kremnitzer model. The most apparent of these is the fact that since the parameters do not have relative weights, it is uncertain which parameters we ought to prioritize. Cohn and Kremnitzer, however, acknowledge the existence of these methodological concerns,⁹⁶ and only attempt to provide a preliminary framework to refine the debate on judicial activism – an aim which they readily achieve.

B. Applying the Cohn-Kremnitzer Model: Three Cases of the Indian Supreme Court

In a further analysis of the Cohn-Kremnitzer model, Cohn applies the model to the House of Lords decision in *A v. Home Secretary*⁹⁷ thereby demonstrating how the theoretical framework provided can be used to measure the activist quotient of decisions.⁹⁸ This part proposes a similar analysis by applying the model to three cases of the Indian Supreme Court: *Maneka Gandhi v. Union of India*,⁹⁹ that expanded the “right to life” jurisprudence in India; *Narmada Bachao Andolan v. Union of India*,¹⁰⁰ which upheld the construction of the Sardar Sarovar Dam Project; and *I.R. Coelho v. State of Tamil Nadu*,¹⁰¹ which dealt with whether laws placed in the Ninth Schedule to the Indian Constitution were subject to the basic structure doctrine.

1. The Right to Life: *Maneka Gandhi v. Union of India*

During the drafting of India's Constitution, Sir B. N. Rau, the Constitutional Advisor to the Drafting Committee was strongly against the inclusion of the due process clause in the Indian

96. Cohn & Kremnitzer, *Judicial Activism*, *supra* note 11, at 355.

97. [2005] 2 A.C. 68.

98. Margit Cohn, *Judicial Activism in the House of Lords: A Composite Constitutionalist Approach*, 1 PUB. L. 95 (2007).

99. (1978) 1 S.C.C. 248 [hereinafter, *Maneka*].

100. (2000) 10 S.C.C. 664 [hereinafter, *Narmada*].

101. (2007) 2 S.C.C. 1 [hereinafter, *Coelho*].

Constitution.¹⁰² He held consultations with several notable legal experts, including Justice Felix Frankfurter of the United States Supreme Court who expressed his view that the due process clause was both undemocratic and burdensome to the judiciary.¹⁰³ In December of 1948, a debate ensued in India's Constituent Assembly regarding a proposed amendment that would replace the "procedure established by law" clause in Article 21 of the current Constitution with the "due process" clause.¹⁰⁴ While some felt that the legislature ought to be trusted not to make laws that would infringe fundamental rights, others felt that the judiciary must be given the authority to question the laws passed by the legislature. Kazi Syed Karimuddin felt warned if the clause "procedure established by law" existed it could "do great mischief in a country which is the storm centre of political parties and where discipline is unknown."¹⁰⁵ In contrast, Alladi Ayyar pointed out that there was a great deal of inconsistency surrounding the due process clause: "I would challenge any member of the Bar with a deep knowledge of the cases in the United States Supreme Court to say that there is anything like uniformity in regard to the interpretation of 'due process.'"¹⁰⁶ Others, like Dr. Ambedkar, chose to refrain from taking a definitive stand on the issue.¹⁰⁷ Eventually, unanimity was arrived at, and the Constituent Assembly rejected all amendments which substituted the phrase "except according to procedure established by law" for "due process of law," "save in accordance with law" and "except in accordance with law." Dr. Ambedkar believed that introducing Article 22 into the Constitution played a kind of balancing role, and it would "save a great deal which had been lost"¹⁰⁸ by the non-inclusion of the due process clause.¹⁰⁹

102. GRANVILLE AUSTIN, *THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION* 103 (1966).

103. *Id.*

104. *See* VII CONSTITUENT ASSEMBLY OF INDIA DEBATES 843 (rev. ed. 1999) [hereinafter, *CAD*].

105. *Id.*

106. *Id.* at 853.

107. *Id.* at 1000-01.

108. *CAD*, *supra* note 104, at 1497.

109. For a further analysis of the Constituent Assembly's rejection of due process, *see generally* H.M. SEERVAI, *CONSTITUTIONAL LAW OF INDIA* 970 (4th ed. 1993) (discussing problems with the Constituent Assembly's reasoning in rejecting the due process clause).

In *A.K. Gopalan v. State of Madras*,¹¹⁰ the Supreme Court declined to read the “due process” clause into Article 21 of the Indian Constitution.¹¹¹ This case dealt with a challenge to the Prevention of Detention Act, 1950,¹¹² on the ground, *inter alia*, that the statute violated Article 21 of the Constitution. The petitioner relied heavily on the United States Constitution, and sought to draw links between Article 21 in the Indian Constitution and the Fifth and Fourteenth Amendments in the United States Constitution.¹¹³ It was further contended that Article 21 must be interpreted to incorporate principles of natural justice, such as an objective test and notice of grounds of detention.¹¹⁴ The Supreme Court rejected these contentions, with Kania, C.J. holding that there were four grounds on which the relevant provisions in the Indian and United States Constitution could be distinguished: (1) in the United States Constitution the word “liberty” was used *simpliciter* while in India it was restricted to personal liberty; (2) in the United States Constitution the identical protection had been given to property, whereas in the Indian Constitution the fundamental right to property was contained in Article 31; (3) as the Constituent Assembly Debates had revealed, the word “due” was deliberately omitted and the expression “due process of law” intentionally found no place with Article 21; (4) and finally, the word “established” was used and limited to “procedure” in Article 21.¹¹⁵ The Court highlighted the express rejection of the due process clause by the Constituent Assembly. Hence, “procedure established by law” was interpreted to mean “procedure prescribed by the law of the State.”¹¹⁶ The Chief Justice also did not accept the argument that Article 21 must incorporate natural justice since the rules of natural justice, as regard to procedure, were “nowhere defined, and . . . the Constitution cannot be read as laying down a vague standard.”¹¹⁷ Subsequent to the decision in *Gopalan*, it was consistently held by the Supreme

110. A.I.R. 1950 S.C. 27 [hereinafter, *Gopalan*].

111. Article 21 of the Indian Constitution reads: “Protection of life and personal liberty – No person shall be deprived of his life or personal liberty except according to procedure established by law.”

112. *Gopalan*, A.I.R. 1950 S.C. 27, ¶ 1.

113. *Id.* ¶ 16.

114. *Id.*

115. *Id.* ¶ 18.

116. *Id.* ¶¶ 21, 89.

117. *Gopalan*, A.I.R. 1950 S.C. 27, ¶¶ 21, 89.

Court in several cases that the due process clause found no place in India's constitutional jurisprudence.¹¹⁸

This position of law underwent significant modification in *Maneka Gandhi v. Union of India*. *Maneka Gandhi* dealt with the procedure for impounding a passport under the Passports Act, 1967.¹¹⁹ The petitioner contended that no such procedure existed, and if even it did, it was arbitrary and unreasonable thereby violating Article 21.¹²⁰ Bhagwati, J. (speaking for Murtaza Fazal Ali, J., Untwalia, J. and himself) held that the procedure prescribed by Article 21 could not be one which was "arbitrary, fanciful or oppressive" rather it "must answer the best of reasonableness" enshrined in the Article 14 (equal protection clause) of the Constitution.¹²¹ Krishna Iyer, J. concurred with this view holding that the procedure prescribed by Article 21 had to be "fair, not foolish, carefully designed to effectuate, not to subvert, the substantive right itself, and that 'law' means a reasonable law and not simply any enacted piece."¹²² Referring to the dissenting judgment of Fazl Ali, J. in the *Gopalan* case, Krishna Iyer, J. stated: "Fazl Ali, J. struck the chord which does accord with a just procedural system where liberty is likely to be the victim. Maybe, the learned Judge stretched it a little beyond the line but in essence his norms claim my concurrence."¹²³ Interestingly, the judges in *Maneka* opted to not overrule *Gopalan* as they considered the conflicting views in *Gopalan* to be merely observations.¹²⁴

The decision in *Maneka* has been critiqued on several grounds. It has been highlighted how the Court's interpretation of Article 21 rendered Article 22(1) meaningless.¹²⁵ In fact, Professor Tripathi points out a remarkable anomaly: whereas aliens were not entitled to the rights in Articles 22(1) and (2), they would be entitled to the far

118. See, eg., *Naranjan Singh v. State of Punjab*, A.I.R. 1952 S.C. 106; *Ram Narayan Singh v. State of Delhi*, A.I.R. 1953 S.C. 277; *Maqbool Hussain v. State of Bombay*, A.I.R. 1953 S.C. 325; *Ram Chandra v. State of Bihar*, A.I.R. 1961 S.C. 1629; *Satwant Singh v. A.P.O., New Delhi*, A.I.R. 1967 S.C. 1836; *State of UP v. Shah Mohammad*, A.I.R. 1969 S.C. 1234; *Bhuvan Mohan Patnaik v. State of AP*, 1974 S.C.C. (Cri.) 803; *Indira Gandhi v. Raj Narain*, (1976) 2 S.C.R. 347.

119. *Maneka*, (1978) 1 S.C.C. 248, ¶ 2.

120. *Id.* ¶ 2.

121. *Id.* ¶ 7.

122. *Id.* ¶ 82.

123. *Id.* ¶ 87.

124. *Id.* ¶¶ 6, 199.

125. K.M. Sharma, *The Judicial Universe of Mr. Justice Krishna Iyer*, (1981) 4 S.C.C. (Jour) 38, 41.

broader range of rights in Article 21.¹²⁶ Further, and more significant for our present analysis, *Maneka* has acquired a legacy of being a highly activist decision that went against the original intent of the Constitutional framers.¹²⁷ Post *Maneka*, the existence of the due process clause in Article 21 has been repeatedly acknowledged, and Article 21 has been used to invoke a range of rights including the right to a speedy trial,¹²⁸ right to privacy,¹²⁹ right against delayed execution,¹³⁰ right against public hanging,¹³¹ right to decent environment,¹³² and right to an open trial.¹³³

Analyzing *Maneka Gandhi* by using the Cohn-Kremnitzer model provides an opportunity to critically assess the overwhelming narrative that regards the decision as activist. Under the first category of the model, the initial parameter is judicial stability. Accordingly, the decision is certainly one that exhibits high level of activism since it departs from previous decisions. Previous decisions, most notably *A. K. Gopalan*, had limited the scope of Article 21 to procedural due process. A similar conclusion may be drawn from the second parameter, since the decision contradicts the original intent of the Constituent Assembly. As discussed earlier, due process was expressly rejected by the Constituent Assembly during the drafting of Article 21, but has effectively been introduced into the Indian Constitution post *Maneka Gandhi*.¹³⁴ Even the third parameter, majoritarianism, reveals a high level of activism since the decision, for all practical purposes, introduced the due process clause into Article

126. P.K. Tripathi, *The Fiasco of Overruling A. K. Gopalan*, (1991) 3 S.C.C. (Jour) 1, 7.

127. See, e.g., A.M. BHATTACHARJEE, *EQUALITY, LIBERTY & PROPERTY UNDER THE CONSTITUTION OF INDIA* 155 (1997); DURGA DAS BASU, *SHORTER CONSTITUTION OF INDIA* 265 (13th ed. 2001) ("Article 21 has now come to be invoked almost as a residuary right - to an extent undreamt of by the fathers of the Constitution or by the Judges who gave it the initial gloss"); M.P. JAIN, *INDIAN CONSTITUTIONAL LAW* 1267 (5th ed. 2003); Justice B.N. Srikrishna, *Skinning a Cat*, SUP. CT. CASES J. 3, 12 (2005) ("What the framers of the Constitution consciously avoided, judicial activism has brought in by the back door.").

128. *Hussainara Khatoon v. State of Bihar*, A.I.R. 1979 S.C. 1360.

129. *Govind v. State of M.P.*, A.I.R. 1975 S.C. 1378.

130. *Vatheeswaran v. State of Tamil Nadu*, A.I.R. 1983 S.C. 361.

131. *Attorney General of India v. Lachma Devi*, A.I.R. 1986 S.C. 467.

132. *Shantistar Builders v. Narayan Khimalal Totame*, A.I.R. 1990 S.C. 630.

133. *Kehar Singh v. State (Delhi Admin.)*, (1988) 3 S.C.C. 609.

134. See T.R. Andhyarujina, *The Evolution of Due Process of Law by the Supreme Court*, in *SUPREME BUT NOT INFALLIBLE* 193 (B.N. Kirpal et al. eds., 2000) (examining how the due process clause has become a part of the Indian Constitution).

21. The decision was heavily grounded in substantive reasoning rather than procedural grounds since it emphasized the importance of liberty. It also disregarded several issues relating to justiciability and significantly expanded the grounds for judicial review. This is evidenced by the wide range of rights, particularly socio-economic rights, which have been enforced through Article 21 after *Maneka Gandhi*. The decision also referred to a range of comparative sources. In light of these features of the decision, the parameters dealing with “judicial reasoning,” “threshold activism,” “judicial remit,” and “comparative sources” all suggest that that decision was highly activist. In the analysis of judicial opinions, while multiple opinions, including concurring opinions, are regarded as highly activist, a unanimous verdict implies low activism. In the case of *Maneka Gandhi*, while there were multiple opinions, Bhagwati, J., whose opinion forms the definitive part of the judgment, spoke for three out of seven judges (including himself). In this context, it probably seems best to regard *Maneka Gandhi* as exhibiting a median degree of activism with respect to this parameter. The decision has application to a broad range of rights and so must be regarded as activist under parameter eleven. The legal background to the decision is Article 21, which seems to be a well-defined and complete provision. Thus, under the final parameter in the first category, a decision dealing with such provisions is not to be regarded as activist. An analysis of the above points to *Maneka Gandhi* being a highly activist decision. It will now be useful to examine the remaining two categories of the model to see if this conclusion is affirmed.

The decision was met by no hostility from either the legislature or the executive. There have been no measures to overturn the decision by other branches of government. As regards the judiciary, the decision has been repeatedly affirmed and applied in a diverse range of cases.¹³⁵ The decision was also not met with public criticism. Hence, there was broad consensus on the judiciary’s decision in *Maneka Gandhi*, meaning that the decision ought to be regarded under this category as an instance of judicial restraint. The final measure as per the Cohn-Kremnitzer model is the third category, which evaluates whether the decision upholds core constitutional values. The decision in *Maneka Gandhi* was driven by the belief that it is not sufficient for Article 21 to merely enact a law as per the valid legislative procedure; rather, the law must conform to standards of

135. *Supra* notes 128-133 and accompanying text.

fairness and justice. A law that was arbitrary in substance, albeit validly enacted, could not pass the test of Article 21. The approach, undoubtedly, took into account the spirit of constitutional principles that exist in order to put forth a liberal interpretation of Article 21. Consequently, the decision had high value content most obviously in its promotion of liberty. Hence, as per this parameter, the judiciary was performing a proper exercise of its functions and could not be understood as acting in an activist fashion.

This discussion of *Maneka Gandhi* reveals that while, as the commentary on the decision argues, there are several characteristics of the decision that lead one to believe that the decision was highly activist, there are also sufficient reasons for believing otherwise. This conclusion has been made possible because using the Cohn-Kremnitzer model enabled the consideration of factors (such as those in the second category), which had hitherto been unexplored. Since the relative weight of the parameters has not yet been formulated, one cannot arrive at a single answer as to whether the decision was activist or restrained. However, it does become clear that the activist quotient in *Maneka Gandhi* is not as patently high as most have argued.

2. *The Construction of the Sardar Sarovar Dam Project: Narmada Bachao Andolan v. Union of India*

The Narmada Dam Project has been one of the most controversial and vociferously opposed development projects in the history of independent India.¹³⁶ The project is estimated to cost over Rs. 40,000 crores (approximately 8,732 million dollars),¹³⁷ and displace approximately 200,000 people.¹³⁸ The Sardar Sarovar Project (hereinafter SSP) is the largest project involved in the construction of a series of dams on the Narmada River in India. Initially funded by the World Bank, the SSP met with stiff opposition from social activists and non-governmental organizations. Consequently, the World Bank established an Independent Review to scrutinize the

136. See RAMACHANDRA GUHA, *INDIA AFTER GANDHI: THE HISTORY OF THE WORLD'S LARGEST DEMOCRACY* 621 (2007) (noting how the Narmada movement was the "most celebrated of tribal assertions in the 1990s" and brought attention to the India's government dismal record of the resettlement of persons displaced by development projects) (hereinafter, GUHA, *India After Gandhi*).

137. Sanjay Sangvai, *Narmada Displacement: Continuing Outrage*, 37 *ECON. & POL. WKLY.* 2132, 2134 (2002) (hereinafter, Sangvai, *Narmada Displacement*).

138. GUHA, *India After Gandhi*, *supra* note 136, at 612.

project. The Independent Review concluded, *inter alia*, that the SSP was flawed, and had failed to take into account environmental considerations and displacement realities.¹³⁹ Consequently, the World Bank withdrew from the project, although the Indian government decided to proceed with the SSP.¹⁴⁰ Those against the construction of the dam emphasized how dams lead to settlement on floodplains, which greatly increase the severity of floods,¹⁴¹ adversely impact the hydrological cycle,¹⁴² and almost always face serious problems in their rehabilitation and resettlement procedures.¹⁴³ Attention was further drawn to India's poor track record in rehabilitating persons displaced by dams,¹⁴⁴ and to the problems being experienced with the SSP rehabilitation.¹⁴⁵ Further, it was pointed out that that the SSP is fundamentally flawed, and would actually lead to consuming more energy than it would in fact produce.¹⁴⁶

139. See generally BRADFORD MORSE ET AL., SARDAR SAROVAR: REPORT OF THE INDEPENDENT REVIEW (1992).

140. However, many important political leaders, such as the then President of India, expressed concern over the project. See, e.g., K.R. Narayanan, *Let Dams Not Ruin the Lives of our Tribal Brothers and Sisters*, 39 MAINSTREAM 7 (2001).

141. See PATRICK MCCULLY, SILENCED RIVERS: THE ECOLOGY AND POLITICS OF LARGE DAMS 27 (1998) (hereinafter, MCCULLY, *Silenced Rivers*).

142. See VANDANA SHIVA, WATER WARS: PRIVATIZATION, POLLUTION AND PROFIT 63 (2002) (discussing how the Kabini project in Karnataka led to the submergence of 6000 acres of land, and the displaced villages needed 30,000 acres of primeval forests to be cleared for relocation; consequently, the local rainfall decreased from 60 to 45 inches, and the life for a dam was greatly reduced as a result of high siltation); see also generally Hiren Gohain, *Big Dams, Big Floods: On Predatory Development*, 43 ECON. & POL. WKLY. 19 (2008) (discussing the impact of big dams on floods in Assam and Arunachal Pradesh).

143. W.M. ADAMS, GREEN DEVELOPMENT: ENVIRONMENT AND SUSTAINABILITY IN THE THIRD WORLD 174-75 (1995) (discussing the array of issues that arise with rehabilitation and resettlement ranging from limited resources to the lack of time devoted to the framing of an effective rehabilitation and resettlement policy).

144. See, e.g., J. Bandyopadhyay, *Dams and Development*, 37 ECON. & POL. WKLY. 4108, 4110 (2002) (pointing out examples of Orissa and Andhra Pradesh, where only 27.69 percent and 25.85 percent of persons displaced by dams have been rehabilitated); see also generally Praful Bidwai, *Vicious Verdict on Narmada*, 38 MAINSTREAM 4 (2000) (noting how three-fourths of the persons that have been displaced by the construction of dams in India have not been resettled).

145. See, e.g., E.G. Thukral, *Big Dams and Displaced People: Introduction*, in BIG DAMS, DISPLACED PEOPLE 24 (E.G. Thukral ed., 1992) (discussing how the rehabilitation in the SSP is leading to the purchase of land from absentee landlords, and consequently the unemployment of laborers who have been engaged in the lands for several years as those receiving the land are tilling it on their own); Sangvai, *Narmada Displacement*, *supra* note 137 (stating that the Madhya Pradesh government has started illegally distributing cash compensation).

146. See, e.g., Arundhati Roy, *The Greater Common Good*, in THE ALGEBRA OF

On the other hand, supporters of the dam contended that the construction of dams in India has reaped considerable rewards.¹⁴⁷ They further posited that the rehabilitation and resettlement scheme of the Sardar Sarovar Dam project was “one of the best in the world.”¹⁴⁸ In response to the argument that alternatives to the dam exist,¹⁴⁹ supporters of the dam argued that water scarcity is a problem of such magnitude that alternatives are insufficient to address the enormity of the situation; they can, at best, supplement the dam.¹⁵⁰ This backdrop to the SSP controversy serves as a useful introduction to the social and political climate surrounding the project as the issue came before the Indian Supreme Court.

Narmada Bachao Andolan (hereinafter NBA), the primary non-governmental organization that was against the construction of the SSP, raised a series of challenges before the Supreme Court.¹⁵¹ These included the contention that the environmental clearance given by the government to the project in 1987 was without proper application of mind, and that even if the dam must be constructed the height should be reduced since rehabilitation as per the Narmada Water Disputes Tribunal’s award could otherwise not take place.¹⁵² With respect to the issues before it, the Court noted that contentions relating to the ideal height of the dam and the environmental impact could not be raised at this stage since the project had already commenced and there had been a great deal of investment already

INFINITE JUSTICE 43, 83 (2002); MCCULLY, *Silenced Rivers*, *supra* note 141, at 155.

147. See, e.g., B.G. Verghese, *A Poetic License*, OUTLOOK, July 5, 1999, available at <http://www.outlookindia.com/full.asp?fodname=19990705&fname=features1&sid=1&pn=1> (last visited Nov. 11, 2008) (discussing how the Bhakra Nangal Dam system supplies 60 per cent of the water consumed in Delhi).

148. Vidyut Joshi, *Rehabilitation in the Narmada Valley: Human Rights and National Policy Issues*, in THE DAM AND THE NATION 174 (Jean Dreze et al. eds., 1997).

149. See generally, e.g., Gabriele Dietrich, *Dams and People: Adivasi Land Rights*, 35 ECON. & POL. WKLY. 3379 (2000) (discussing a micro hydel project that was launched in the Narmada valley); Mike Levien, *Gujarat: Leaked White Paper on Dam Alternatives*, 38 ECON. & POL. WKLY. 5323 (2003) (discussing a leaked white paper of the Gujarat government that reveals that several government officials have been advocating the alternative water management techniques which have been put forth by opponents of the dam).

150. See Manisha Verma, *Narmada Dam: What Alternatives?*, 39 ECON. & POL. WKLY. 510, 600 (2004).

151. *Narmada*, (2000) 10 S.C.C. 664, ¶ 42.

152. The Narmada Water Disputes Tribunal had been established under the Inter-State Water Disputes Act, 1956, to adjudicate the water dispute relating to the Narmada River. *Id.* ¶14.

undertaken in its execution.¹⁵³ Hence, the Court noted that its primary concern was only whether relief and rehabilitation measures were taking place, and if Article 21 of the tribal persons had consequently been violated.¹⁵⁴

Senior counsel Shanti Bhushan, appearing on behalf of the petitioner, argued that the forcible displacement of tribals from their land and sources of livelihood was in violation of their rights under Article 21 of the Indian Constitution.¹⁵⁵ Rejecting this argument, the Court held that the displacement of persons does not per se result in the violation of their fundamental rights.¹⁵⁶ The appropriate test according to the Court, to determine such violation, was to examine the rehabilitation sites and compare them with the original habitation.¹⁵⁷ On the question of whether the SSP had been comprehensively assessed by policy makers, the Court examined the history of the project in detail and arrived at the conclusion that the project had been duly considered by the government (i.e., there had been application of mind).¹⁵⁸ The petitioner also raised several arguments with respect to rehabilitation and resettlement.¹⁵⁹ For example, it was argued that rehabilitation measures were only being undertaken for persons submerged by the project and not others affected by it.¹⁶⁰ Attention was also drawn to how different states were implementing dissimilar rehabilitation policies leading to inconsistent measures being provided.¹⁶¹ Further, it was argued that the 1995 Master Plan of Narmada Control Authority has grossly underestimated the number of persons who would be displaced, and that rehabilitation was not taking place as per the Tribunal's award.¹⁶²

In sum, the Court rejected the arguments of the petitioner emphasizing that courts would refrain from entering into questions of policy; it could not undertake the role of the government despite

153. *Narmada*, (2000) 10 S.C.C. 664, ¶¶ 46-50.

154. This argument concerning laches was rejected by Bharucha J. who wrote the minority judgment in the decision. Bharucha J. noted that the process of relief and rehabilitation was going on during the time that the writ petition was filed, and thus the laches argument was not valid.

155. *Narmada*, (2000) 10 S.C.C. 664, ¶ 52.

156. *Id.* ¶ 62.

157. *Id.*

158. *Id.* ¶ 90.

159. *Id.* ¶¶ 130-141.

160. *Id.* ¶ 135.

161. *Narmada*, (2000) 10 S.C.C. 664, ¶ 134.

162. *Id.* ¶¶ 134, 136.

problems with the policy.¹⁶³ It also highlighted that if a policy decision was challenged, then the challenge must take place prior to the execution of the project or else laches would apply.¹⁶⁴ The Court concluded that the construction of the dam would continue as per the Tribunal's award.¹⁶⁵ Since the Relief and Rehabilitation Subgroup had cleared the construction of the dam up till the height of 90 meters, the Court held that this construction should be undertaken immediately, and that further raising of the dam's height would take place *pari passu* with relief and rehabilitation measures and clearance from the Subgroup.¹⁶⁶ Was *Narmada Bachao Andolan* an instance of judicial activism or judicial restraint? Much of the majority judgment underlines the importance of courts to restrain from entering into questions of policy. Presumably, the Court believed that it was not being activist. Analyzing the decision through the Cohn-Kremnitzer model should serve useful in validating this claim.

On the question of "judicial stability," it is difficult to perfectly characterize the decision as an instance of activism or restraint. While on the one hand precedent suggests a broad and liberal interpretation of Article 21 (although precedent has not been perfectly uniform in this regard), on the other, the decision did not lead to the creation of any new law. Hence, it seems best to regard the decision as having a median tending towards low degree of activism under this parameter. Similarly, the interpretation of Article 21 provided by the Court was a strict textual interpretation signifying judicial restraint. The decision exhibited a great deal of deference to government policy and there was very limited judicial interference, meaning that the decision ought to be regarded as highly restrained under the third parameter "majoritarianism and autonomy" of the model. The decision was ground in procedural reasoning, particularly the Court's argument relating to the petitioner's delay in approaching the Court. Therefore, this also illustrates judicial restraint as there were limited substantive grounds for the Court's decision. There was clear reliance on threshold barriers by the Court's decision. This is demonstrated not only by the laches argument, but by the initial reluctance of the Court to grant NBA standing.¹⁶⁷ Hence, the

163. *Id.* ¶ 229.

164. *Id.*

165. *Id.* ¶ 254.

166. *Id.*

167. See FREDMAN, *Human Rights Transformed*, *supra* note 5, at 140.

parameter "threshold activism" also points to judicial restraint. There was no expansion of the grounds of judicial review, and in fact, it is arguable that there was a regression in this regard. Also, the decision relied purely on domestic law and did not place significant reliance on comparative sources. Thus, even under the parameters "judicial remit" and "comparative sources" the decision is highly restrained. Applying the parameters "rhetoric," "obiter dicta," "extent of decision," and "legal background" to the decision suggests a median degree of activism: The decision was long but did not have a high-level of substance-value rhetoric, there was considerable but not overwhelming obiter dicta, the decision had neither a broad nor a narrow scope of application, and while the Constitutional provisions before the Court were not complex, the Court was required to examine several other legal provisions which were not defined in as simple and complete a manner. Finally, while a three-judge bench of the Indian Supreme Court delivered the decision, there was one dissent.¹⁶⁸ Consequently, the decision would have to be regarded as activist under the parameter "judicial voices" as it was not a unanimous verdict.

Evaluating *Narmada Bachao Andolan* through the first part of the Cohn-Kremnitzer model strongly suggests that the decision was one of judicial restraint. Moving on the second part of the model, neither the legislature nor judiciary reacted adversely to the decision, similarly exhibiting judicial restraint. On the administrative front, however, there has been a failure to implement the decision: The executive is allegedly not increasing the height of the dam *pari passu* with relief and rehabilitation measures as per the Court's directive.¹⁶⁹ If so, this points to judicial activism, as does the parameter "public reaction" as the decision invited a great deal of criticism from civil society. Finally, the decision gave minimal regard to the protection of core constitutional values, in this case liberty. Hence, assessing the value-content of the decision, the decision is to be regarded as activist as the judiciary did not safeguard "thin values."

The decision in *Narmada Bachao Andolan* was disapproved of by many.¹⁷⁰ To name but one, S. P. Sathe, the eminent Indian

168. *Narmada*, (2000) 10 S.C.C. 664, ¶¶ 256-85.

169. See Gargi Parsai, *Violation of Court Orders*, THE HINDU, Mar. 25, 2006, available at <http://www.hindu.com/2006/03/25/stories/2006032518682100.htm>.

170. See, e.g., Rajeev Dhavan, *The Narmada Decision*, 14 LEGAL NEWS & VIEWS 27 (2000) (discussing the absurdity of the Court's view that it was limited in its actions because of the award of the Narmada Water Disputes Tribunal); L. C. JAIN, DAM V.

constitutional scholar, criticized the decision as it seemed “unfortunately to be suggesting [the Supreme Court’s] withdrawal from the larger role which it has assumed in recent decades.”¹⁷¹ Unlike the analysis of the decision in *Maneka Gandhi*, applying the Cohn-Kremnitzer model confirms the restrained nature of the decision in *Narmada Bachao Andolan*. It does, however, underline the complexity in judicial decisions and serves in demonstrating that even a decision as restrained as *Narmada Bachao Andolan* can be activist by some parameters; something which the commentary on the decision has ignored.

3. The Ninth Schedule Decision: *I.R. Coelho v. State of Tamil Nadu*

In the case of *I.C. Golaknath v. State of Punjab*, the Indian Supreme Court held that the Indian Parliament’s power to amend the Constitution was limited, and Parliament could not abridge or take away any of the fundamental rights under the Constitution.¹⁷² The Court however, applied the doctrine of “prospective overruling” to hold that that the basic structure principle had only prospective application and thus the impugned First, Fourth and Seventeenth Amendments to the Indian Constitution were not struck down.¹⁷³ Parliament reacted strongly to the decision in *Golaknath*, and passed the Constitution (Twenty-Fourth Amendment) Act, 1971.¹⁷⁴ The Amendment was intended to enable Parliament to have unlimited powers to amend the Constitution and consequently nullify the decision in *Golaknath*. The Twenty-Fourth Amendment, as well certain other constitutional amendments passed by Parliament, were the subject of challenge in the *Kesavananda Bharati v. State of Kerala*,¹⁷⁵ widely regarded as perhaps the most important decision in India’s constitutional jurisprudence.¹⁷⁶ While the Government of

DRINKING WATER: EXPLORING THE NARMADA JUDGMENT (2001); Mathew John, *Interpreting Narmada Judgment*, 36 ECON. & POL. WKLY. 3030 (2001) (discussing how the judgment also indicates the failure of other legal communities in India apart from judiciary).

171. Sathe, *NBA*, *supra* note 63.

172. A.I.R. 1967 S.C. 1643.

173. *Id.* ¶ 78.

174. AUSTIN, *Democratic Constitution*, *supra* note 38, at 243-47.

175. (1973) 4 S.C.C. 225 [hereinafter, *Bharati*].

176. Austin, *Democratic Constitution*, *supra* note 38, at 258-77 (referring to the *Kesavananda Bharati* decision as one that would “profoundly affect the country’s democratic process”, and providing an excellent political and historical analysis of

India relied heavily on the Diceyan belief of the supremacy of the legislature in constitutional democracies to argue that Article 368 of the Constitution placed no limits whatsoever on Parliament's power of amendment, the Supreme Court held that Parliament's power under Article 368 was limited and that no constitutional amendment could damage or destroy the "basic structure" of the Constitution.¹⁷⁷ The decision in *Kesavananda Bharati* attracted, and continues to attract, sharp criticism. Commentators highlight the decision's anti-majoritarian and undemocratic nature.¹⁷⁸ Despite this basic structure, the doctrine has found support amongst others,¹⁷⁹ and has been applied in a wide range of cases that confirm its existence as an independent standard of review in Indian constitutional adjudication.¹⁸⁰

The case of *I. R. Coelho v. State of Tamil Nadu* arose as a result

how the decision was arrived at). For an analysis of the *ratio* in the decision, see P.K. Tripathi, *Kesavananda Bharati v. The State of Kerala: Who Wins?*, (1974) 1 S.C.C. (Jour) 3; see generally Upendra Baxi, *The Constitutional Quicksands of Kesavananda Bharati and the Twenty-fifth Amendment*, (1974) 1 S.C.C. (Jour) 45; DHAVAN, *Parliamentary Sovereignty*, *supra* note 66.

177. See *Bharati*, (1973) 4 S.C.C. 225. Interestingly, *Golaknath* was overruled as it had held that a constitutional amendment could never abrogate or take away a fundamental right; *Kesavananda Bharati* held that the same may or may not result in a violation of the basic structure doctrine.

178. See, e.g., P.K. Tripathi, *Rule of Law, Democracy, and Frontiers of Judicial Activism*, 15 J. INDIAN L. INST. 17, 33 (1975); T.R. ANDHYARUJINA, *JUDICIAL ACTIVISM AND CONSTITUTIONAL DEMOCRACY IN INDIA* 10 (1992); Ramachandran, *Basic Structure Doctrine*, *supra* note 2 (observing the anti-democratic nature of the doctrine and discussing how it hinders constitutional reform).

179. See, e.g., Virendra Kumar, *Basic Structure of the Indian Constitution: Doctrine of Constitutionally Controlled Governance*, 49 J. INDIAN L. INST. 365, 397 (2007) (observing that the basic structure doctrine is the "single most factor that has made the survival of our Constitution possible in its pristine form") (hereinafter, Kumar, *Basic Structure*). See also Pratap Bhanu Mehta, *The Inner Conflict of Constitutionalism: Judicial Review and the "Basic Structure,"* in INDIA'S LIVING CONSTITUTION: IDEAS, PRACTICES, CONTROVERSIES 179 (Zoya Hasan et al. eds., 2002) (discussing how the judicial review of constitutional amendments need not necessarily be anti-democratic).

180. See, e.g., *Indira Nehru Gandhi v. Raj Narain*, A.I.R. 1975 S.C. 2299 (where the Thirty-Ninth Amendment to the Indian Constitution was struck down as violating the basic structure doctrine); *Minerva Mills v. Union of India*, A.I.R. 1980 S.C. 1789 (where clauses (4) and (5) that were inserted into Article 368 of the Indian Constitution were similarly struck down); *Waman Rao v. Union of India*, A.I.R. 1981 S.C. 271 (where the constitutionality of Articles 31-A and 31-C was upheld on the basis of the basic structure doctrine); Kumar, *Basic Structure*, *supra* note 179 (observing that "what was initially propounded as a principle in *Kesavananda Bharati* has now become, as a result of successive juristic developments... an axiom or definite doctrine with a reasonably clear resonance").

of Article 31-B of the Indian Constitution.¹⁸¹ In sum, Article 31-B, introduced by the First Amendment to the Indian Constitution, allows laws placed by Parliament into the Ninth Schedule to the Constitution to be resistant from the challenge that they violate fundamental rights. Article 31-B reads as follows:

Validation of certain Acts and Regulations – Without prejudice to the generality of the provisions contained in Article 31-A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part, and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent legislature to repeal or amend it, continue in force.

Although Article 31-B was initially conceived to give effect to statutes dealing with land reforms, in time it has served to protect a vast range of legislative acts from judicial review.¹⁸² Consequently, a conflict arose because, as Professor Kumar notes, while Article 31-B conferred on Parliament unlimited powers by excluding judicial review when Parliament amended the Ninth Schedule to the Constitution, the basic structure doctrine meant that Parliament's power of amendment was limited and that courts had the power to control the exercise of the power through judicial review.¹⁸³ The resolution of this conflict was the subject of *I. R. Coelho*, as a nine-judge bench of the Indian Supreme Court attempted to address the applicability of the basic structure doctrine to Article 31-B of the Constitution.¹⁸⁴ The central question before the Court was whether, after the date of the pronouncement of the basic structure doctrine (4/24/1973), it was permissible for Parliament as per Article 31-B to immunize legislations by inserting them into the Ninth Schedule, and, if so, how this affected the power of judicial review.¹⁸⁵ The Court held that the basic structure doctrine would apply to all constitutional amendments, whether or not the amendment amends a particular

181. *Coelho*, (2007) 2 S.C.C. 1.

182. The Seventy-Eighth Amendment to the Indian Constitution made the number of legislations in the Ninth Schedule a sum total of 284.

183. Kumar, *Basic Structure*, *supra* note 179.

184. *Coelho*, (2007) 2 S.C.C. 1, ¶ 5.

185. *Id.*

provision of the Constitution, or inserts legislations into the Ninth Schedule to the Constitution.¹⁸⁶ The Court said it would apply the “direct impact and effect test” to determine violations of the Constitution’s basic structure.¹⁸⁷ The *I. R. Coelho* decision marked an important doctrinal development of the Court’s basic structure jurisprudence, from its emphasis on the relationship between the doctrine and fundamental rights to its clarification that it is basic features that the doctrine protects and not so much individual articles.¹⁸⁸ It is important to note that the Court did not delve into the constitutionality of Article 31-B in this case. The Court declined to answer the question holding: “[b]e as it may, we will assume Article 31-B as valid. The validity of the 1st Amendment inserting in the Constitution, Article 31-B is not in challenge before us.”¹⁸⁹ The constitutionality of the provision had been previously upheld in *Sankari Deo v. Union of India*,¹⁹⁰ though the decision was prior to the pronouncement of the basic structure doctrine.

The *I. R. Coelho* was met with significant public attention. At an already volatile moment in the relationship between Parliament and the judiciary, the decision was regarded as yet another instance of judicial activism.¹⁹¹ The decision was regarded as a noteworthy one,¹⁹² and while some highlighted how it had “reshaped Indian law,”¹⁹³ and made India’s Supreme Court “one of the most powerful courts in the world and also one of the most unaccountable,”¹⁹⁴ others pointed out that the decision was neither that significant nor surprising.¹⁹⁵ In

186. *Id.* ¶ 133.

187. *Id.* ¶ 150.

188. Kumar, *Basic Structure*, *supra* note 179, at 394-97.

189. *Coelho*, (2007) 2 S.C.C. 1, ¶ 79.

190. A.I.R. 1951 S.C. 458.

191. See, e.g., V. Venkatesan, *Judicial Challenge*, 24 FRONTLINE 5, 8 (Feb. 9, 2007) (“[T]he nine-Judge Bench has clearly gone beyond its mandate . . .”).

192. See, e.g., Pratap Bhanu Mehta, *No More Dark Spaces*, INDIAN EXPRESS, Jan. 13, 2007, available at http://www.indianexpress.com/story/20738_.html.

193. Milan Dalal, *India's New Constitutionalism: Two Cases that Have Reshaped Indian Law*, 31 B.C. INT'L & COMP. L. REV. 257, 257 (2008).

194. Indira Jaising, *Ninth Schedule: What the Supreme Court Judgment Means*, REDIFF, Jan. 11, 2007, available at <http://www.rediff.com/news/2007/jan/11indira.htm>.

195. See Subhash C. Kashyap, *Ninth Schedule Can't Help: Evading Judicial Scrutiny Not Possible*, THE TRIBUNE, Jan. 29, 2007, available at <http://www.tribuneindia.com/2007/20070129/edit.htm#4> (last visited July 20, 2008) (noting that the decision is “very largely a reiteration of the existing law as declared by the Supreme Court in earlier cases”); A.G. Noorani, *Ninth Schedule and the Supreme Court*, 42 ECON. & POL. WKLY. 731, 734 (2007) (“The judgment is neither an exercise of ‘judicial activism,’ as properly understood, nor a defeat for ‘progressive’

addition to political criticism being leveled against the Supreme Court,¹⁹⁶ the decision also led to protests and heated reactions amongst sections of the public.¹⁹⁷ In this context, the *I. R. Coelho* decision serves as a useful experiment for us to “measure” judicial activism using the Cohn-Kremnitzer model.

Judicial stability, the first parameter to be examined, evaluates whether the decision exhibits deference to the court’s previous decisions. In *Coelho*, the Court followed precedent and applied the ratio in *Kesavananda Bharati*.¹⁹⁸ The decision was a consequence of their attempt to harmonize the interpretation of Article 31-B with the ratio in *Kesavananda Bharati*. As Sabharwal C. J., who spoke for the Court, noted: “Article 31-B cannot go beyond the limited amending power contained in Article 368.”¹⁹⁹ Thus, the decision cannot be considered as activist as per this parameter. On the question of interpretation, the conflict between the basic structure doctrine and Article 31-B meant that the Court was unable to follow a purely textual reading of Article 31-B and give it a narrow interpretation, thereby signaling a high degree of judicial activism. The Court’s decision was a definite limitation on Parliament’s power to amend the Ninth Schedule, and formally expanded the judiciary’s power of judicial review to legislations inserted in the Ninth Schedule to the Constitution. Consequently, the check on majoritarianism and the expansion of judicial review both constitute a high degree of activism. Further, a high degree of activism must also be associated with the next two parameters as the decision has a broad scope of application (all legislations inserted in the Ninth Schedule after 4/24/1973) and contains a high level of substance value rhetoric. Similarly, the decision is not grounded in process-based reasons, but rather in substantive grounds, again exhibiting a high level of activism. On the

legislation. It is a statement of the obvious.”). I too arrived at a similar conclusion on a preliminary reading of the decision; see also Madhav Khosla, *The Ninth Schedule Decision: Time to Define the Constitution’s Basic Structure*, 42 ECON. & POL. WKLY. 3203 (2007) (“[T]he decision naturally flows from the decision in *Kesavananda Bharati*...”).

196. See Pradeep Kaushal, *Ninth Schedule: SC Crossing Boundary*, *JD(U) Chief Tells PM*, INDIAN EXPRESS, Jan. 24, 2007, available at <http://www.indianexpress.com/story/21624.html>.

197. See Jaya Menon, *Ninth Schedule Verdict: Angry Reactions Across Tamil Nadu*, INDIAN EXPRESS, Jan. 13, 2007, available at <http://www.indianexpress.com/story/20800.html>.

198. See generally *Coelho*, (2007) 2 S.C.C. 1, ¶¶ 150-151.

199. *Id.*

other hand, the decision was made under a simple and complete set of rules, as there was no ambiguity in Article 31-B. The decision was based entirely on domestic law, was not influenced by any comparative jurisprudence, and was unanimous. Hence, the final three parameters under the first category of the Cohn-Kremnitzer model all indicate a low degree of activism.

Despite political criticism of the decision, there have been no legislative attempts to overturn the decision and thus the first parameter of the next category in the Cohn-Kremnitzer model signifies low activism, as does the parameter studying judicial input, because the judiciary has not overruled the decision. As noted above, the public response has been mixed and varied. While the decision led to protests amongst sections of the public, such protests were limited to those directly affected by the decision. Similarly, while some dismiss claims that the decision was an instance of judicial overreach, others emphasize its dangers. Finally, as the decision does not hold any implications for the executive branch of government, the administrative yardstick is found to be inapplicable in this case. Hence, as regards the function to participate in a constitutional dialogue, the judiciary's actions in *I. R. Coelho* exhibit a low degree of activism. An analysis of *I. R. Coelho*, and of the basic structure doctrine in general, reveals that the doctrine is rooted in the belief that some constitutional values are inalienable, values that cannot be taken away even by Parliament. Hence, the third category of the Cohn-Kremnitzer model finds remarkable applicability in *I. R. Coelho* since protecting the core values in the Constitution – its basic structure – was the fundamental basis of the Court's decision. Since the basic structure doctrine is founded on the principle that Parliament has no power to abrogate certain features that are core values within the Constitution, the decision in *I. R. Coelho* cannot be regarded as activist as per this parameter.

As noted above, the *I. R. Coelho* decision was met with sharp reactions from several quarters. Barring few commentators, protest rallies and media commentary suggested that the decision was a highly activist one.²⁰⁰ However, applying the Cohn-Kremnitzer to the decision presents a very different picture; the decision has both shades of activism and restraint, and if anything, the overall picture leans more towards restraint.

200. *Supra* note 191, 193.

IV: Conclusion

Since the Indian Supreme Court introduced public interest litigation and began an era of socio-economic rights adjudication two decades ago, the term “judicial activism” has repeatedly found its way into evaluations of the Court’s practice. Yet, no methodology has emerged that allows us to do justice to the term and to the nature of the Court’s decision-making. Examining the judicial activism discourse in the Indian Supreme Court, with reference to the contributions of Upendra Baxi, has demonstrated the need for such a methodology to exist. The Cohn-Kremnitzer model is an impressive attempt at providing such a methodology. Central to a large part of the argument in this paper, and to the Cohn-Kremnitzer model, is the belief that judicial decisions are complex and that assessing the existence, and extent, of judicial activism is a process that requires the consideration of numerous factors. Applying the Cohn-Kremnitzer model to the decisions in *Maneka Gandhi v. Union of India*, *Narmada Bachao Andolan v. Union of India* and *I. R. Coelho v. State of Tamil Nadu* indicates that the decisions are more multifaceted than the commentary on the cases suggests. In particular, this paper demonstrates that the Cohn-Kremnitzer model makes it possible to experience how judges “can be activist in one respect and restrained in another.”²⁰¹ This paper has modest aims. Neither does it propose to conduct a detailed study of the judicial activism debate in the Indian Supreme Court, nor does it suggest that the Cohn-Kremnitzer model may end it. Yet, by analyzing the decisions in *Maneka Gandhi*, *Narmada Bachao Andolan* and *I.R. Coelho*, it is clear that the model enables one to move beyond the current impasse in the debates on judicial activism in the Indian Supreme Court. Through this, one may hope to gain a deeper insight into judicial behavior in the Indian Supreme Court, and understanding judicial behavior, as Judge Richard Posner recently reminded us, “is a key to legal reform.”²⁰²

201. Cohn & Kremnitzer, *Judicial Activism*, *supra* note 10, at 338.

202. RICHARD POSNER, *HOW JUDGES THINK* 5 (2008).
